82-945

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can the National Labor Relations Board order backpay for illegal aliens, thereby creating a fundamental conflict between the National Labor Relations Act and the Immigration and Nationality Act?

2. Is the imposition of an arbitrary six-month backpay liability on an employer an improper punitive remedy?

3. Does an employer "constructively discharge" its employees by requesting an investigation of their immigration status?

4. Does the National Labor Relations Act require an offer of reinstatement to be held open for four years, to be delivered in a manner allowing verification of receipt, and to be written in Spanish?

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Sure-Tan, Inc. and Surak Leather Company[1] petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 12, 1982.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 12, 1982, has not been officially reported (25a; 30a)[2].

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[1] The National Labor Relations Board found that both firms constituted a single, integrated employer. *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1189 (1978).

[2] References herein to "a" pages are to pages in the Appendix to this petition.

The decision of the United States Court of Appeals for the Seventh Circuit denying a Petition for Rehearing and Suggestion for Rehearing *En Banc*, entered May 5, 1982, is reported at 677 F.2d 584 (36a).

The opinion of the United States Court of Appeals for the Seventh Circuit, entered on February 24, 1982, as amended on February 26, 1982, is reported at 672 F.2d 592 (1a).

The Decision and Order of the National Labor Relations Board, entered March 6, 1978, is reported at 234 N.L.R.B. 1187 (61a).

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1982 (25a, 30a). Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on March 10, 1982. The court of appeals' order denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on May 5, 1982 (36a).

On September 15, 1982, Sure-Tan, Inc. and Surak Leather Co. filed an Application for Extension of Time in Which to File Petition for Writ of Certiorari. An order extending time in which to file a petition for Writ of Certiorari was entered by this Court on September 17, 1982, extending the time for Sure-Tan, Inc. and Surak Leather Co. to file a Petition for Writ of Certiorari to and including December 6, 1982.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

National Labor Relations Act

Section 7 of the National Labor Relations Act of 1947, 29 U.S.C. § 157, provides, in pertinent part, as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8(a)(1) and (3) of the National Labor Relations Act of 1947, 29 U.S.C. § 158(a)(1) and (3), provides, in pertinent part, as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 10(c) of the National Labor Relations Act of 1947, 29 U.S.C. § 160(c), provides, in pertinent part, as follows:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Immigration and Nationality Act

Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), provides, in pertinent part, as follows:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visa and shall be excluded from admission to the United States:
>
> . . . .
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified . . . , and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Section 241 of the Immigration and Nationality Act, 8 U.S.C. § 1251, provides, in pertinent part, that:

> (a) Any alien in the United States (including an alien crewmen) shall, upon order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry . . . .

Section 287 of the Immigration and Nationality Act, 8 U.S.C. § 1357, provides, in pertinent part, that:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States . . . .

National Labor Relations Board Casehandling Manual

Section 10528.15 of the National Labor Relations Board Casehandling Manual (Part III) provides as follows:

> To avoid misunderstanding, the Compliance Officer should advise employers to make offers of reinstatement in writing and should likewise advise discriminatees to respond thereto in writing.

STATEMENT OF THE CASE

Respondents Sure-Tan, Inc. and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois. Sure-Tan employed approximately 11 workers in 1976. A number of these employees were Spanish speaking (3a).

In August, 1976, the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "union") filed an election petition with the National Labor Relations Board (the "Board"), and an election was held on December 10, 1976. The union won the election (2a).

After the election, John Surak, one of the owners of Sure-Tan, inquired with the Immigration and Naturalization Service ("INS") as to the immigration status of certain of its employees. By letter dated January 20, 1977 to the INS, Surak stated as follows:

> We would like you to check the emigration [sic] status of several [of] our employees, who are Mexican nationals:
>
> Floriverto Rodriguez, also known as Manuel Vega, Social Security Number 322-52-1459
>
> Juan P. Florez, also known as Jose Martinez, Social Security Number 338-50-1497

Jesus Patina, Social Security Number 327-58-7445, also known as Manuel Rosiles, Social Security Number 357-56-3731 also known as Hector Maldonado

Francisco Robles, Social Security Number 466-11-2550

Ernesto Arreguin, Social Security Number 357-48-2329

Sacremento Serrano, Social Security Number 236-47-5634

Primitino Cervantez, Social Security Number 338-62-3142

Arguimiro Ruiz, Social Security Number 548-06-8995

We appreciate your attention to this request as soon as possible.

Yours very truly,

Sure-Tan, Inc.

V. J. Surak

In response to this letter, the INS checked its files to see if the individuals named were lawful permanent residents of the United States. Thereafter, on February 18, 1977, INS agents visited Sure-Tan and discovered that five of the eight employees listed in Surak's letter (Flores, Robles, Arreguin, Serrano and Ruiz) were residing illegally in the United States. These illegal aliens were arrested by INS agents. Each illegal alien was permitted by the INS to execute INS form I-274, whereby he acknowledged that he was a Mexican citizen illegally present in the United States. The illegal aliens were then placed aboard a bus that transported them back to the Mexican border (9a-10a).

The Board's General Counsel issued complaints against Sure-Tan on February 22, 1977 and March 23, 1977, alleging, *inter alia*, that Sure-Tan discriminatorily discharged the five illegal alien employees (66a). On March 29, 1977, Sure-Tan mailed letters offering reinstatement to the five illegal aliens (20a). Each letter stated as follows:

> Sure-Tan, Inc. offers you full and complete reinstatement of your former job, provided only that your reemployment shall not subject Sure-Tan, Inc. to any violations of the United States immigration laws.
>
> Please report to work no later than May 1, 1977, if you accept this offer of reemployment.

The Administrative Law Judge concluded that Sure-Tan constructively discharged these five illegal aliens, in violation of Sections 8(a)(1) and (3) of National Labor Relations Act (the "Act") by requesting INS to investigate their immigration status (77a). The ALJ's recommended order called for Sure-Tan to offer reinstatement to the employees, with the offer to remain open for six months. The ALJ reasoned that, since the alleged discriminatees were not available for employment after their return to Mexico, there should be no backpay award (80a-81a).

A three member panel of the Board (Fannings, Jenkins, and Penello), in its decision and order of March 6, 1978, adopted the conclusions of the ALJ, but modified the remedy, ordering that the illegal aliens be offered unconditional reinstatement, with backpay (63a-64a).

The Board's General Counsel, on September 7, 1978, filed a "Motion For Clarification," requesting that the Board "make plain" what the Company's obligations were under the Board's order (53a). The General Counsel observed that the order "appears to require reinstatement and backpay without regard to the discriminatee's illegal alien status ...." (55a). Such result, the General Counsel noted, would be "contrary to the national immigration policies and laws," because it would encourage the alleged discriminatees to reenter the country illegally (56a).

A majority of the Board (members Fanning, Jenkins and Truesdale) issued an order on December 5, 1979 denying the General Counsel's Motion for Clarification, and reaffirming the

Board's earlier order (44a). Members Penello and Murphy dissented. Member Penello noted that:

> The majority's refusal to consider how the enforcement of the National Labor Relations Act (NLRA) may be effectuated in such a way as to fit in with the implementation of the current goals of immigration policies manifests an overwhelming indifference and insensitivity to other Federal law, either alone or as it may impact on the current labor and economic situation in this country.

Member Penello would have granted the Motion for Clarification, and limited to the order "so as to require [Sure-Tan] to offer reinstatement only to discriminatees lawfully in the country" (45a). Member Murphy would have limited the back pay period "to a time from the date of discharge to the date of deportation," and would have also limited the time for acceptance of the Company's reinstatement offer to two weeks (50a-51a).

The court of appeals, in its decision of February 24, 1982, enforced the Board's order, subject to the following modifications: (1) reinstatement would be required only if the alleged discriminatees were lawfully entitled to be present and employed in this country when they offer themselves for reinstatement (22a); (2) the reinstatement offer would remain open for a period of four years (22a); (3) in computing back pay, the discriminatees would be deemed unavailable for work during any period when they were not lawfully entitled to be present and employed in the United States (23a); (4) backpay would be placed in escrow for a period of one year (23a); and (5) the Board, "if it sees fit," could modify its order further by setting a minimum period of six months for which backpay would be awarded, regardless of the lawful availability of the discriminatees for work during the backpay period (23a-24a).

Finally, the court of appeals held that Sure-Tan's prior offer of reinstatement to the alleged discriminatees was defective because it did not hold the offers open for a period of four years, was not delivered in a manner allowing verification of receipt, and was not written in Spanish (22a).

In its judgment and order of July 12, 1982, the court of appeals eliminated the discretion it had previously given the Board to modify its order with respect to backpay, and required that each discriminatee be awarded a minimum of six months' backpay (28a).

REASONS FOR GRANTING THE WRIT

The court of appeals' judgment and order, which would award illegal aliens six-months' pay, creates a fundamental conflict between the National Labor Relations Act, as it is interpreted by the court, and the Immigration and Nationality Act. The clear purpose of the INA is to protect American workers from an influx of foreign labor. The court of appeals, however, would treat the illegal aliens as though they had a right to remain illegally in the United States for an additional six months after their detection by the INS. This single-minded application of Federal labor laws for the purpose of punishing an employer manifests an overwhelming disregard for Federal immigration policies.

The Board and the court of appeals also misapply the "constructive discharge" doctrine, by holding Sure-Tan liable for actions undertaken by the Immigration and Naturalization Service in accordance with Federal immigration laws. In effect, the court of appeals seeks to impose a six-month backpay penalty on Sure-Tan for asking the INS to investigate the immigration status of the employees. Such punitive Board orders are not permitted under Section 10(c) of the Act.

I. THE SIX-MONTH BACKPAY AWARD SUBVERTS FEDERAL IMMIGRATION OBJECTIVES.

The court of appeals ordered that a minimum of six months' backpay be awarded to the illegal aliens because such a period of time would be "the minimum during which the discriminatees may reasonably have remained employed without apprehension by the INS, but for the employer's unfair labor practice" (23a; 28a-29a; 32a). Thus, the court treats the illegal aliens as though they had a right to remain in this country for an additional six months, when in fact they had no legal right to reside in the United States in the first place. By rewarding illegal aliens for their illegal presence in the United States, the court flouts the objectives of the Immigration and Nationality Act.[3]

Furthermore, the court of appeals' backpay award provides the illegal aliens with a significant incentive to reenter this country illegally. The court of appeals in fact acknowledged that: "It obviously remains a possibility ... that the discriminatees in this case might be motivated to reenter the United States unlawfully to claim reinstatement and backpay." (18a). The court sidesteps this danger by surmising that a discriminatee would be unlikely to attempt to illegally enter the United States to pursue his remedies, and thereby "draw attention to his illegal alien status." (18a). The court further opines that: "Indeed, the economic and social attractions which

[3] Section 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14) provides that a foreign national is excludable from the United States:

> [U]nless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified ..., and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

generally encourage illegal migration to this country are probably more compelling inducements than the special fruit of the Board's order might be in this case." (18a).

It is difficult to conceive, however, of a more "compelling inducement" to reenter this country illegally than the windfall backpay award ordered by the court. Such an inducement to illegally reenter this country would clearly subvert Federal immigration objectives.[4] The clear objective of Congress under the INA is to protect American workers from an influx of foreign labor. The objectives of the INA have been articulated in a number of court opinions. In *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), the District of Columbia Circuit observed that Section 212(a)(14) of the INA is written "so as to set up a presumption that aliens should not be permitted to enter the

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[4] The Board's own General Counsel, in his Motion for Clarification, expressly recognized the inappropriateness of the Board's traditional remedy of reinstatement and backpay in this case, stating:

> If the Board order is construed to require reinstatement and backpay without regard to status, it would surely encourage a discriminatee to return to the United States, since there would be a Board-ordered job for him here. Similarly, if mere physical presence in this country is sufficient to trigger the running of backpay, . . . a discriminatee would be encouraged to return to the United States illegally, so that he could reap these jobs in monetary benefits as soon as possible, rather than postpone them perhaps give up these benefits entirely by delaying his return until the uncertain day, far in the future, when he *may* be able to enter the United States lawfully.

(55a).

Although the court of appeals modified the Board order to eliminate the possibility of reinstatement of an employee who is not legally residing in this country, it *increased* the incentive for the employee to return illegally to collect backpay.

United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers."[5]

This Court has recognized that the Board is obligated to formulate remedies that comport with Congressional objectives under other statutory schemes. In *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), this Court faulted the Board for ordering reinstatement and backpay to striking seamen, where the order ran contrary to the federal anti-mutiny statute, stating that:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.[6]

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[5] *Accord Wang v. Immigration and Nationality Service*, 602 F.2d 211, 213 (9th Cir. 1979) (per curiam); *Stenographic Machines, Inc. v. Regional Administrator for Employment and Training*, 577 F.2d 521, 529 (7th Cir. 1978); *Williams v. Usery*, 531 F.2d 305, 307 (5th Cir.), *cert. denied*, 429 U.S. 1000 (1976); *Silva v. Secretary of Labor*, 518 F.2d 301, 310 (1st Cir. 1975).

[6] The court of appeals maintains that its remedy does not run contrary to *Southern Steamship Co.* because the order does not "necessarily" encourage illegal immigration (18a n.17). However, as discussed *supra* at pp. 10-11, the backpay award wrongly presumes that the illegal aliens had a right to remain in the United States for six additional months, and provides the illegal aliens with a strong incentive to return illegally to this country.

Similarly, in the present case, it is not too much to demand of the Board and the court of appeals that they formulate remedies that comport with the objectives of the INA.[7] As noted by Judge Wood in his dissent to the court's order denying Sure-Tan's Petition for Rehearing: "The NLRB seems to use only its private knothole to view these issues and sees nothing except its own labor goals. I think this court instead of peering through the NLRB's knothole should look over the fence for a better understanding of the whole problem." (38a).

Unless this Court helps the court of appeals and the Board "look over the fence" by granting certiorari to review the court's backpay remedy, the court and the Board will continue to peer through the Board's "private knothole" and subvert Federal immigration objectives.

II. THE AWARD OF SIX-MONTHS' BACKPAY TO THE ILLEGAL ALIENS CONSTITUTES AN IMPROPER PUNITIVE REMEDY VIOLATIVE OF SECTION 10(c) OF THE ACT.

The court acknowledged that the six month period for computing backpay was "obviously conjectural." (23a). In addition to being conjectural, the award is blatantly punitive, having the same purpose and effect as a criminal fine. The

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[7] Members Penello and Murphy, in their dissenting opinions to the Board's order denying the General Counsel's Motion for Clarification, criticized the majority for its utter indifference to national immigration policy (45a; 50a). Member Murphy observed that:

> The majority's refusal to consider how the enforcement of the National Labor Relations Act (NLRA) may be effectuated in such a way as to fit in with the implementation of the current goals of immigration policies manifests an overwhelming indifference and insensitivity to other Federal law, either alone or as it may impact on the current labor and economic situation in this country. However, nothing in the NLRA or its policies gives the Board a special dispensation to ignore other legislation.

(48a).

court of appeals, in fact, recognized that the illegal aliens should be deemed unavailable for work and ineligible for back pay "during any period when not lawfully entitled to be present and employed in the United States." (23a). Yet, the court orders a minimum payment of six-months' backpay, contrary to its own procedure for computing backpay, to assure that all the illegal aliens get at least some monetary award. This imposition of an arbitrary backpay liability has no purpose other than to punish Sure-Tan for asking the INS to determine the immigration status of its Spanish-speaking employees.

Section 10(c) of the Act[8] authorizes the Board, when it has found the employer guilty of an unfair labor practice, to require him to desist from such practices "and to take such affirmative action, including reinstatement of employees with or without backpay, *as will effectuate the policies of this* [Act]" 29 U.S.C. § 160(c) (emphasis added). This Court has repeatedly held, however, that the Board's authority under Section 10(c) is remedial, not punitive.

In the case of *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940), this Court denied enforcement of part of a Board order which required an employer to reimburse governmental agencies for wages paid under a work relief program to employees who had been discriminatorily discharged by Republic Steel. This Court held that the Board did not have any authority under Section 10(c) of the Act to order an employer to make such payments to governmental agencies, stating:

> We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction

[8] 29 U.S.C. § 160(c).

> enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board may be of the opinion that the policies of the Act may be effectuated by such an order." We have said that the power to command affirmative action is remedial, not punitive.

Id. (citations omitted).

The prohibition against punitive orders under Section 10(c) of the Act applies equally to the court of appeals. The court's arbitrary six-month backpay award is wholly impermissible.[9] As noted by Judge Woods: "Much of the rationale for [the court's reinstatement and backpay remedy] seems to be to punish the employer. Punishment of employers of illegal aliens, however, is for Congress, not for us." (38a).

The court of appeals' assessment of a six-month backpay penalty in this case, in derogation of Section 10(c) of the Act, represents a legislative act that not even rampant judicial activism should entertain. This Court should grant certiorari to check the court of appeals' improper infringement of powers which should be reserved for Congress.

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[9] In *Kroger Company v. N.L.R.B.*, 401 F.2d 682, 688-89 (6th Cir. 1968), *cert. denied*, 395 U.S. 904 (1969), the Sixth Circuit denied enforcement to part of a Board order requiring the employer to make contributions to a voluntary profit sharing plan, where there was no basis for determining what an employee's contribution to the plan would have been in the absence of the employer's unfair labor practice. The court stated:

> We do not consider that a punitive order denominated as a remedy is called for, nor should the Kroger employees be provided a "windfall" that could accrue from a working out of the complications inherent in obedience to . . . the Board's order. . . . Any effort to make such a determination [of the amount employees would have contributed to the voluntary profit sharing plan] would be pure speculation.

Similarly, in the present case, any determination of how long the illegal aliens would have remained working absent Sure-Tan's inquiry to the INS would be pure speculation, and an arbitrary award of backpay would represent a windfall to the illegal aliens.

III. SURE-TAN DID NOT CONSTRUCTIVELY DISCHARGE EMPLOYEES WHO WERE ILLEGAL ALIENS WHEN IT ASKED THE IMMIGRATION AND NATURALIZATION SERVICE TO INVESTIGATE THEIR IMMIGRATION STATUS.

The court of appeals concluded that Sure-Tan's inquiry to the INS relative to the legal status of its Spanish-speaking employees was motivated by anti-union animus, and "was the proximate cause of their departure." (12a). The court therefore held that Sure-Tan constructively discharged the illegal aliens in violation of Sections 8(a)(1) and (3) of the Act when it asked INS to investigate their immigration status (15a).[10]

Contrary to the court of appeals' conclusion, however, the return of the illegal aliens to Mexico was "proximately caused" by their own illegal status. Sure-Tan's inquiry to the INS facilitated the Service's performance of its statutory obligations; it in no way mandated the actions of the INS. The INS has a legal duty to uphold the Federal immigration laws—a duty that is not legally conditioned upon or modified by the actions of Sure-Tan.[11] It would be indeed anomalous and fundamentally

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[10] Adopting the rationale of the Fifth Circuit in *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981) (en banc), the court of appeals reasoned that:

> [T]wo elements are required to establish a constructive discharge. "First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted 'to encourage or discourage membership in any labor organization' within the meaning of Section 8(a)(3) of the Act."

The first element is clearly absent in this case, because the employees' illegal presence in this country, not the actions of Sure-Tan, mandated their deportation.

[11] The duties of an INS officer include the interrogation of any alien or person believed to be an alien as to his right to remain in the United States. 8 U.S.C. § 1357. The immigration laws further call for deportation of any alien who, at the time of entry into the United States, was within one of the classes of excludable aliens (8 U.S.C. § 1251(a)(1)), including aliens who, like the alleged discriminatees in the present case, entered the United States unlawfully for the purpose of performing skilled or unskilled labor. 8 U.S.C. § 1182(a)(14).

unfair to hold Sure-Tan responsible for the actions of the INS, where those actions were mandated by Federal immigration laws.[12]

The court of appeals noted that it is of "considerable significance" that the alleged discriminatees were not deported by the INS, but rather "voluntarily departed" from this country after executing an INS form I-274 (9a, n. 11; 17a). Under this analysis, the court of appeals would hold Sure-Tan responsible for actions *voluntarily* undertaken by the illegal aliens. As noted by Judge Wood:

> If we [had analyzed the case properly] I do not believe that the employers' notification to the Immigration and Naturalization Service would be construed as a "constructive discharge" so as to reward the illegal aliens for their illegal labor activities with possible reinstatement and backpay. . . .
>
> Rather than approve the majority's concocted remedy, I would, even if it took some stretching of the doctrine, simply consider the case moot when the illegal aliens "voluntarily" returned to their country. . . . As it is, this court has given proxies to illegal aliens to cast votes for American workers and now has given the illegal aliens some encouragement to come back, displace our own workers and be awarded a backpay bonus for doing it. At least the view of the majority may serve to inspire Congress to rescue us from this state of things which is our own judicial doing (38a).

Sure-Tan, however, should not have to await uncertain Congressional action to rescue it from this improper imposition of liability for actions of the INS. This Court should act promptly, by granting certiorari in this case, to review and redress the court of appeals' misapplication of the constructive discharge doctrine.

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[12] Indeed, as noted by the Ninth Circuit in *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979): "An employer who suspects that an employee is in the United States without proper authority should report this information to the INS."

IV. THE NATIONAL LABOR RELATIONS ACT DOES NOT REQUIRE SURE-TAN'S REINSTATEMENT OFFER TO BE LEFT OPEN FOR FOUR YEARS, TO BE WRITTEN IN SPANISH, AND TO BE SENT IN A MANNER ALLOWING VERIFICATION OF RECEIPT.

The court's requirement that Sure-Tan leave its offers of reinstatement open for a period of four years represents a radical departure from normal Board procedures and places an undue burden on Sure-Tan, as well as Sure-Tan's present employees. The requirement that Sure-Tan translate its reinstatement offers into Spanish and send them in a manner allowing verification of receipt was also improper. None of these measures are required under the Board's normal practices. The Company should not be held, after the fact, to such stringent standards that have not been applied to other employers.

A. Four Year Reinstatement Period.

The Company's reinstatement offers were mailed to the alleged discriminatees on March 29, 1977 and remained open until May 1, 1977. This thirty day reinstatement period far exceeded the period required by the Board in other cases. In *American Enterprises, Inc.*, 200 N.L.R.B. 114 (1972), the Board approved a reinstatement offer that remained open for a period of six days. In *Woodland Supermarket*, 240 N.L.R.B. 295 (1979), the Board held that eight days was a reasonable period to hold open reinstatement offers.[13]

The Board's rejection of Sure-Tan's 30 day reinstatement offer and insistence on a six-month period was wholly unjustified. The court of appeal's four year reinstatement period is

[13] *See also NLRB v. W.C. McQuaid, Inc.*, 552 F.2d 519 (3rd Cir. 1977), wherein the Third Circuit held that less than two weeks was a reasonable period to hold open reinstatement offers.

wholly unreasonable. Indeed, a four year reinstatement period is patently punitive, because it bears no reasonable relationship to the time required for the employees to respond to the Company's reinstatement offer.

As observed by the District of Columbia Circuit in *White Sulphur Springs Co. v. NLRB*, 316 F.2d 410, 415 (D.C. Cir. 1963), approving a reinstatement offer that remained open for only three days, "the employer was certainly entitled to know where it stood . . . ." Similarly, in the recent case, Sure-Tan was entitled to know where it stood with respect to reinstatement of the illegal aliens. The six month reinstatement period ordered by the Board and the four year period ordered by the Seventh Circuit would place Sure-Tan and the employees who replaced the illegal aliens in a state of limbo for an unreasonable period of time.

B. The Requirement That the Offers Be Written In Spanish and Be Sent By Means Allowing Verification of Receipt.

The Board's Casehandling Manual (Part III), § 10528.15, provides that: "To avoid misunderstanding, the Compliance Officer should advise employers to make offers of reinstatement in writing and should otherwise advise the discriminatees to respond thereto in writing." Nowhere in the Board's Casehandling Manual does the Board require that written reinstatement offers be sent in an employee's native language or in a manner allowing verification of receipt.

In holding that Sure-Tan's reinstatement offers were defective because they were written in English rather than in Spanish, the Board and the court of appeals required the company to incur the cost of hiring an interpreter to communicate with its employees. Such an extraordinary requirement is, in effect, an impermissible punitive remedy.

It is fundamentally unfair to require Sure-Tan, after the fact, to write the offers in Spanish, and mail them by registered or certified mail, where such measures are not required under the Board's own procedures. This Court has recognized that, "[w]hen the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and give clear indication that it has exercised the discretion with which Congress has empowered it." *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443 (1965). Where the Board has reached different conclusions in prior cases, it is essential that the "reasons for decisions in and distinctions among these cases" be set forth to dispel any appearance of arbitrariness. *Id.* at 442.

In the present case, Sure-Tan's reinstatement offers fully complied with the standards set forth in the Board's Casehandling Manual and in prior cases. Neither the Board nor the court of appeals offered any reasonable basis for requiring these offers to be left over for four years, to be written in Spanish, and to be sent in a manner allowing verification of receipt. This Court should grant certiorari to prevent the Board and the court of appeals from arbitrarily imposing these extraordinary requirements on Sure-Tan.

V. CONCLUSION

The court of appeals' order places the National Labor Relations Act in direct conflict with the Immigration and Nationality Act. The court's presumption that the illegal aliens would have remained in this country for another six months but for Sure-Tan's inquiry to the INS, and its award of six months' pay to the illegal aliens, reflects a brazen indifference to Federal immigration objectives. In effect, the court of appeals would grant the Board a license to ignore and subvert the INA in order to punish employers. This single-minded application of the National Labor Relations Act, in derogation of the policies and purposes of the Immigration and Nationality Act, contravenes this Court's mandate in *Southern Steamship* that the Board tailor its remedies to accommodate other Federal statutes.

The imposition of an arbitrary six-month backpay liability is also blatantly punitive. Further, the requirement that the reinstatement offers be left open for four years, be written in Spanish, and be sent in a manner allowing verification of receipt is an unjustified departure from Board precedent.

This Court should grant certiorari in this case to prevent the Board and the court of appeals from subverting Federal immigration policies and from imposing arbitrary and punitive remedies on employers.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2448

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SURE-TAN, INC., and SURAK LEATHER CO.,

Respondent.

On Application For Enforcement Of An
Order Of The National Labor Relations Board

ARGUED SEPTEMBER 30, 1981—DECIDED FEBRUARY 24, 1982
AS AMENDED FEBRUARY 26, 1982

Before CUDAHY, *Circuit Judge*, FAIRCHILD, *Senior Circuit Judge*, and BROWN, *Senior District Judge.**

CUDAHY, *Circuit Judge*. When these same respondents were before us several years ago, we noted in passing certain "bogeymen" who now have made a full appearance calling on us for decision in this matter of first impression. *See NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 358 n.3 (7th Cir. 1978). In this prior decision involving the same respondent, we held that illegal aliens are "employees" protected by the National Labor Relations Act (the "Act" or "NLRA"). We presently confront the further knotty problem of rectifying the injustice done certain of these aliens, whose labor was gratefully accepted and broadly utilized but whose efforts at labor organization were rebuffed by expulsion from the United States.

* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

Unfortunately, more than five years have passed since the occurrence of the discriminatory acts underlying the order of the National Labor Relations Board (the "Board") in this case. Even more unfortunately, whatever remedy is approved here may have little effect in discouraging employer conduct which violates the rights of employees under the NLRA—conduct which the employer now argues was merely consistent with his duty under the Immigration and Naturalization Act (the "INA").

Respondent Sure-Tan, Inc., and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois.[1] Both firms are owned and operated by Steve and John Surak, and at the times relevant to this case they employed approximately eleven workers. Most of these employees were Mexican nationals in the United States without visas or work permits. A union organization drive began at Sure-Tan in July, 1976, and eight employees signed cards authorizing the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "Union"),[2] to act as their collective bargaining representative. On August 12, 1976, the Union filed an election petition with the Board and an election was held on December 10, 1976. The Union won the election, and on January 19, 1977, the Board notified Sure-Tan that its objections were overruled and that the Union was certified as the employees' collective bargaining representative.

On February 22 and March 23, 1977, the Board's Acting Regional Director for Region 13 issued complaints against Sure-Tan, charging that Sure-Tan violated sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act by dis-

[1] The Board found that both firms constituted a single, integrated employer and respondents have not challenged this finding on appeal. *Sure-Tan, Inc.*, 234 N.L.R.B. 1181, 1189 (1978); *see NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 358 (7th Cir. 1978).

[2] The Union is currently affiliated with the United Food and Commercial Workers International Union, AFL-CIO.

criminatorily discharging five employees because of their union activities; threatening, interrogating and coercing its employees to discourage them from engaging in protected activities; and discriminatorily reprimanding an employee who filed a complaint with the Board. The case was heard by an administrative law judge (ALJ) who upheld the complaints in all respects. The Board affirmed and adopted the ALJ's findings and conclusions but modified the backpay and reinstatement remedy proposed by the ALJ. We shall discuss separately each issue raised by Sure-Tan with respect both to the merits of the Board's order and the Board's revised reinstatement and backpay remedy. In summary, we find that substantial evidence supports the Board's order in this case, subject to certain modifications of the remedy.

I. *Interrogations and Threats*

The ALJ found that on several occasions between August, 1976 (after the Union began its organization efforts), and December, 1976, John Surak threatened, coerced and interrogated various employees about their union support in violation of section 8(a)(1) of the Act. Former employee Floriberto Rodriguez testified that at some time during August, 1976, John Surak approached a group of employees (including Rodriguez) asking in English and Spanish, "You all union?" When Rodriguez responded that they knew nothing about the Union, Surak retorted by calling them "mother fucking son of a bitches" before leaving the room.[3]

Former employee Francisco Robles testified that in October, 1976, John Surak showed him a piece of paper with squares marked "yes" and "no." Surak pointed to the "yes" square and told Robles, "Union no good. Little

[3] Although not constituting a violation of sections 8(a)(1) or 8(a)(3), the ALJ noted as background evidence of Sure-Tan's anti-union animus another incident in October in which John Surak told Rodriguez that he was "stupid" and that "You and the union are motherfucker son of a bitches." Rodriguez quit his job with Sure-Tan immediately after this incident.

work." Pointing to the "no" square, Surak told Robles "[T]he Company is good. A lot of work here." Surak then marked the "no" square saying, "O.K. Francisco?" to which Robles replied, "O.K." Robles testified that Surak approached another employee (Primitivo Servantez) in Robles' presence at some time in December before the election and attempted to give that employee similar advice about the "yes" and "no" squares. When Surak was unable to communicate in English with this employee, he asked Robles to translate the message into Spanish. Robles then told Servantez that Surak wanted him to mark the "no" square on his election ballot.

Robles further testified that two hours after the election on December 10, 1976, John Surak addressed a group of employees (which included Robles, Arguimiro Ruiz and Primitivo Servantez) exclaiming "no friends, no amigos," and using the word "immigration." Surak asked the employees, "Union why? Union why?" and he also cursed them saying "Mexican son of a bitch." Surak then asked Robles whether he possessed proper immigration papers; Robles replied that he did not have appropriate documentation. Surak also asked the other employees if they possessed proper immigration papers; Servantez replied, through Robles, that "nobody had papers there."[4] Employee Albert Strong also testified that after the election on December 10, John Surak told him, "Your dream finally came true, but I won't stay in business."[5]

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[4] The General Counsel also presented to the ALJ the affidavits of three other former Sure-Tan employees who voluntarily departed the United States for Mexico after John Surak informed the immigration authorities that they were probably illegally present in the United States. *See* section III *infra*. These employees did not appear at the hearing and the ALJ did not credit their affidavits even though they recounted similar instances of threats and interrogations. We agree with the ALJ's assessment of this evidence and further note that the evidence would be merely cumulative of the already sufficient proof supporting the complaint.

[5] Albert Strong was discriminatorily discharged in violation of section 8(a)(3) by Sure-Tan's predecessor (also owned and

(Footnote continued on following page)

Sure-Tan contends that the ALJ erred by crediting the testimony of Rodriguez, Robles and Strong and that the ALJ's finding of a violation of section 8(a)(1) based upon this testimony is therefore not supported by substantial evidence as required by section 10(e) of the Act, 29 U.S.C. § 160(e) (1976). We must disagree. The only evidence in support of its claim to which Sure-Tan directs our attention is the testimony of John Surak. Surak denied that he made any of the quoted statements or that he threatened or interrogated his employees about their union activities. But the ALJ, who conducted the hearing and observed Surak's demeanor, discredited what he deemed Surak's hesitant and evasive testimony. After reviewing the transcript of the hearing, we cannot conclude that the ALJ erred in discrediting Surak's uncorroborated and self-serving declarations. *See NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 571-72 (7th Cir. 1980). On review, we will fault the Board for accepting an ALJ's credibility determinations only when such determinations are inherently incredible, unreasonable or conflict with the clear preponderance of the evidence. *NLRB v. Hospital and Institutional Workers Union, Local 250*, 577 F.2d 649, 652 (9th Cir. 1978); *see First Lakewood Associates v. NLRB*, 582 F.2d 416, 420 (7th Cir. 1978); *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1331-32 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978). Surak's uncorroborated denials do not meet this standard.

Sure-Tan's contention that Surak's statements do not amount to a violation of section 8(a)(1) is similarly without merit. Under section 8(a)(1), an employer commits an unfair labor practice by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1) (1976). Proof of successful interference, restraint or coercion is unnecessary; a violation of section 8(a)(1) is demonstrated by an employer's conduct which *tends* to interfere with the rights of

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[5] *continued*
operated by the Surak brothers) for his support of an organizational drive. *See National Rawhide Manufacturing Co.*, 202 N.L.R.B. 893 (1973).

employees to organize a union. *Jays Foods, Inc. v. NLRB*, 573 F.2d 438, 444 (7th Cir.), *cert. denied*, 439 U.S. 859 (1978). The ALJ was more than justified in concluding that Surak's instructions to Robles and Servantez, implying that a "yes" vote (approving union representation) would result in "little work," constitutes a threat within the ambit of section 8(a)(1). Although free to predict the economic consequences of unionization, an employer unlawfully threatens his employees when he warns of an adverse economic impact without providing an objective basis for the employees to believe that the predicted result is not caused solely at the employer's initiative. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *NLRB v. Gogin*, 575 F.2d 596, 600-01 (7th Cir. 1978).

Moreover, the ALJ justifiably concluded that Surak unlawfully interrogated his employees when he questioned them about their support of unionization. Interrogation violates section 8(a)(1) when, properly viewed in the context of an employee-employer relationship, the employer's questioning may have reasonably induced fear in the employees causing them to refrain from assisting a union. *NLRB v. Gogin*, 575 F.2d 596, 600 (7th Cir. 1978); *Satra Belarus, Inc. v. NLRB*, 568 F.2d 545, 547-48 (7th Cir. 1978). Surak's questions about union support, followed by ethnic slurs, inquiries into the employees' immigration status, occasional ascriptions of canine ancestry and other expressions of Surak's anti-union animus are unarguable and flagrant examples of interrogation prohibited by section 8(a)(1).

II. *Additional Threats and Layoffs*

The ALJ also found that Sure-Tan violated sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act, 29 U.S.C. §§ 158(a)(1), (3) & (4) (1976), by reprimanding employee Albert Strong for filing a complaint with the Board. Strong testified that on or about January 31, 1977, he filed a complaint at the local Board office alleging that he had been discriminatorily laid off by Sure-Tan for several weeks after the union election. Shortly after he filed this complaint, John Surak approached Strong at

work and berated him for filing the complaint. Steve Surak then joined in, echoing his brother's claim that Strong was a "dirty son of a bitch" and stating to Strong that "You are trying to get money like you did before."[6] Several days after this incident, John Surak called Strong a "lazy punk" for failing to move some bags of chemicals. Strong responded by telling Surak that he intended to report Surak to the Board. Later that same day, Steve Surak gave Strong a letter of reprimand.[7] This was the first letter of reprimand issued to Strong in his 11 years of employment with the Surak brothers.

The ALJ concluded that the Surak brothers' verbal harassment of Strong shortly after he filed a complaint with the Board and the subsequent letter of reprimand[8] were motivated by Strong's long-standing union support and his effort to invoke the Board's legal processes and, thus, violated sections 8(a)(1), 8(a)(3) and 8(a)(4). Sure-Tan contends that the ALJ erred by crediting Strong's testimony as against the Surak brothers' denial that any of these statements were ever made. The ALJ's credibility determinations must stand, especially when the only contrary evidence consists of the Surak brothers' own self-serving denials.[9] *See NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 571-72 (7th Cir. 1980).

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[6] This statement apparently referred to the previous charge filed by Strong against the Surak brothers. *See* note 5 *supra*.

[7] The letter stated:

> This note is to warn you that we are not satisfied with your work. You do not follow the orders and your attitude toward work is very negative. If you will not change this conduct we will terminate your job.

[8] The ALJ found, and we concur, that the "lazy punk" incident (together with another similar contemporaneous name-calling occurrence not described here) was in itself rather trivial and does not merit an unfair labor practice charge. However, the Surak brothers' subsequent letter of reprimand clearly constituted, as the ALJ found, an overreaction to this minor work dispute. Hence, we will not overturn the Board's finding that the reprimand was motivated by Strong's support of the Union and his recourse to Board processes.

[9] Indeed, this was not the first time that an ALJ chose to credit Strong's testimony vis-a-vis the Surak brothers. *See National Rawhide Manufacturing Co.*, 202 N.L.R.B. 893, 895-98 (1973).

We also reject Sure-Tan's argument that these findings, which are supported by substantial evidence on the whole record, do not establish violations of sections 8(a)(1), 8(a)(3) and 8(a)(4). The ALJ justifiably concluded that the Surak brothers' threatening remarks and written reprimand addressed to Strong shortly after he filed charges (or, more precisely, indicated his intention to file additional charges) impeded Strong's exercise of protected rights and his access to the Board in violation of sections 8(a)(1) and 8(a)(4). *See NLRB v. Scrivener*, 405 U.S. 117, 121-25 (1972); *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 275-76 (8th Cir. 1979). *See generally Glenroy Construction Co. v. NLRB*, 527 F.2d 465, 468 (7th Cir. 1975). Moreover, the ALJ correctly found, in light of the Surak brothers' demonstrated anti-union animus and the fact that their disciplinary reprimand followed closely on the heels of Strong's resort to Board processes, that the reprimand was discriminatorily motivated and thus violated section 8(a)(3). *See Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1334-35 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978). The ALJ's inference seems even more justifiable in view of the circumstances that Strong had never before been reprimanded during his long and sometimes checkered tenure with the Surak brothers. The Suraks' only excuse for this disciplinary action—the alleged insubordination—was clearly pretextual. *See Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 843-45 (8th Cir. 1979).

III. *Constructive Discharge*

On January 17, 1977, the Board's Acting Regional Director overruled Sure-Tan's objections to the representation election and certified the Union as the collective bargaining agent for Sure-Tan's employees. Sure-Tan received notice of the Acting Regional Director's decision on January 19. On the next day, January 20, 1977, John Surak sent the following letter to the Immigration and Naturalization Service (INS):

> We would like to ask you to check the emigration [sic] status of several [of] our employees, who are Mexican nationals:

Juan P. Florez, also known as Jose Martinez, Social Security Number 338-50-1497

Francisco Robles, Social Security Number 466-11-2550

Ernesto Arreguin, Social Security Number 357-48-2329

Sacremento Serrano, Social Security Number 236-47-5634

Arguimiro Ruiz, Social Security Number 548-06-8995

* * *[10]

We appreciate your attention to this request as soon as possible.

Yours very truly,

SURE-TAN, INC.
V. J. Surak

INS agents visited Sure-Tan's premises on February 18, 1977, to check the immigration status of all Spanish-speaking employees. After a short investigation and an interview with Sure-Tan's employees, the INS agents discovered that each of the five employees listed in the quoted letter were living and working illegally in the United States. These employees were then arrested by the INS agents and removed from Sure-Tan's premises. Later that same day, each employee executed an INS Form I-274, by which he acknowledged that he was a Mexican citizen illegally present in the United States. By executing this form, each employee also accepted the INS' grant of voluntary departure as a substitute for deportation.[11] Thus, by the end of the day, each of these

[10] The letter also listed several other individuals whose names are not included here because they are not involved in the current charges.

[11] Contrary to the apparent assumption of the ALJ, the Board, the General Counsel and counsel for Sure-Tan, these employees were *not* deported but instead left this country on a grant of voluntary departure. General Counsel's Exhibits 20-

(Footnote continued on following page)

former Sure-Tan employees, at his own expense, was placed aboard a bus bound for El Paso, Texas.

The Board concluded that Sure-Tan constructively discharged these five employees, in violation of sections 8(a)(1) and 8(a)(3), by sending this letter to the INS in retaliation for union activity. Sure-Tan counters this conclusion by arguing that at the time the letter was sent, John Surak had only "doubts" about his employees' immigration status, and that the "deportation" of the employees was the "proximate result" of their illegal status rather than Surak's letter to the INS. We reject Sure-Tan's contentions and affirm the Board's conclusion that Sure-Tan's actions amounted to constructive discharge.

The principle determining liability under section 8(a)(3) is that the employer's conduct affecting an employee's hire, tenure or terms of employment must be motivated, at least in part, by anti-union considerations. *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1331 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978); *Satra Belarus, Inc. v. NLRB*, 568 F.2d 545, 548 (7th Cir. 1978). The existence of a discriminatory motive is a question of fact which the factfinder may resolve by relying on both direct and circumstantial evidence. *NLRB v. Gogin*, 575 F.2d 596, 601 (7th Cir. 1978). Of course, the substantial evidence standard applies to our review of this question, *Gogin*, 575 F.2d at 602, and we shall accord appropriate weight to the Board's findings and conclusions. *See Electri-Flex*, 570 F.2d at 1331-32.

In assessing Sure-Tan's motive for sending the letter to the INS, we first note that both before and after the election, John Surak engaged in various sorts of unlawful conduct (primarily threats and interrogations directed toward his Spanish-speaking employees) which clearly reflected a bald anti-union animus. This evidence

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[11] *continued*

25; *see* 8 U.S.C. § 1254(e) (1976); 8 C.F.R. § 242.5 (1981). This fact is of considerable significance for our analysis of Sure-Tan's arguments regarding the reinstatement and backpay remedy. *See* section IV *infra*.

of contemporaneous unfair labor practices is highly relevant in establishing motive under section 8(a)(3). *See NLRB v. Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971).

Sure-Tan argues, however, that neither of the Surak brothers knew their employees were illegal aliens (although the brothers admit to doubts in the matter). Hence, the Suraks assert they merely performed their civic duty in writing the INS. But the Board found, and the great weight of the evidence supports the Board's finding, that John Surak was well aware that his employees were illegally residing in the United States. Employees Robles and Servantez told Surak shortly after the election that none of his employees possessed the proper immigration papers. Moreover, Surak executed an affidavit on January 10, 1977—10 days before he sent the letter to the INS—stating that a confidential source told him several months *before* the election that "these men were illegally here." General Counsel's Exhibit 32. Finally, Surak's counsel at the time of the election (who is also counsel for Sure-Tan on this appeal) twice admitted in statements filed with the Board in December following the election (but before the certification of the Union) that one of the grounds for objecting to the election was that "[s]ix of those seven voters are unlawfully residing and working in the United States, those persons being Mexican Nationals who have not received permission or right . . . to reside and work within the United States." General Counsel's Exhibit 11, p. 1; *see* General Counsel's Exhibit 12, pp. 1-2 (wherein Sure-Tan admits that Surak confirmed the illegal status of his employees by personally quizzing each about his immigration status). Quite apart from any doubts we may have of the accuracy of Sure-Tan's affidavits filed with the Board and its assertions on this appeal, we are, based upon inconsistent factual positions taken at one time or another by the Suraks,[12] unwilling to overturn

[12] We note that the argument advanced by counsel on this appeal regarding the Surak brothers' knowledge of the illegal alien status of these employees borders on the ludicrous when considered in connection with the prior affidavits of fact procured by this same counsel.

the Board's conclusion that "John Surak . . . was aware that most of his employees were illegal aliens." 234 N.L.R.B. at 1190 (footnote omitted).

Sure-Tan also challenges the ALJ's finding of a section 8(a)(3) violation by arguing that the letter to the INS does not amount to a "constructive discharge." Section 8(a)(3) is violated only when the employer's discrimination affects "hire," "tenure" or a "term or condition of employment." 29 U.S.C. § 158(a)(3) (1976). Constructive discharge occurs, and may give rise to a section 8(a)(3) violation, even though the employer does not directly or forthrightly terminate an employee but rather creates working conditions so intolerable that the employee is forced to resign. *See Cartwright Hardware Co. v. NLRB*, 600 F.2d 268, 270 (10th Cir. 1979); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972). For purposes of section 8(a)(3), two elements are required to establish a constructive discharge. "First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted 'to encourage or discourage membership in any labor organization' within the meaning of section 8(a)(3) of the Act." *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981) (en banc) (quoting 29 U.S.C. § 158(a)(3) (1976); *accord NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32-34 (1967).

Sure-Tan's argument here that any intolerable condition forcing termination was created by the employees' status as illegal aliens is specious. By putting the INS on notice of these alien employees when it knew of their illegal status, Sure-Tan took action which was the proximate cause of their departure. Indeed, the INS agent who conducted the investigation testified that John Surak's letter "precipitated" his inspection and investigation. Surak, when he sent this letter, surely foresaw and intended the ultimate result of the INS' investigation. Moreover, we reject Sure-Tan's argument that it was legally obligated to disclose the presence of the alien employees to the INS. Sure-Tan has not cited, nor has our research disclosed, any provision in the INA which requires an employer to notify the INS that he employs

illegal aliens.[13] Although there is some authority that "[a]n employer who suspects that an employee is in the United States without proper authority should report this information to the INS," *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979), an employer has no right to rely on a "moral obligation" to report illegal aliens (of which he has been previously oblivious) merely to sanctify an otherwise unjustifiable violation of section 8(a)(3). *See NLRB v. Sure-Tan, Inc.*, 583 F.2d 355, 360 n.9 (7th Cir. 1978).[14] A contrary holding would en-

[13] Under the current statutory scheme, the *alien* who unlawfully enters this country to seek employment without obtaining proper certification violates the INA. *See* 8 U.S.C. § 1182(a)(14) (Supp. I 1977). An alien's illegal status under the INA does not, as Sure-Tan contends, immunize an employer's constructive dismissal of an alien employee which is motivated by anti-union animus. Although an alien's inability to procure proper authorization from the INS to reside and work in the United States might, standing alone, constitute sufficient grounds for discharge, there is no authority under either the NLRA or the INA sanctioning a constructive discharge which is otherwise invalid under section 8(a)(3), based on the employee's status as an illegal alien. Even if the instant case could properly be classified as a "mixed motive" case because of the presence of a potentially justifiable reason for the constructive discharge, we believe that the General Counsel clearly sustained his burden of demonstrating an illegal motive under the Act for Sure-Tan's conduct, and Sure-Tan has not rebutted this evidence. Specifically, Sure-Tan has not shown that absent anti-union animus, it would have engineered these employees' departures. *See NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207 (7th Cir. 1981).

[14] We are not so naive as to believe that Sure-Tan does not share some practical blame in this case for any alleged violation of the immigration laws. We find it difficult to believe that a metropolitan Chicago employer can employ a work force almost exclusively made up of Spanish-speaking men of Mexican origin at wages within pennies of the minimum wage (and at hard and unappetizing work) without even suspecting that some of these employees are illegal aliens. There seems nothing like a successful union election to concentrate an employer's mind on the color of its workers' visas (if they exist) and on its moral obligations to expel its (once faithful) employees from the country.

courage employers to hire illegal aliens, who would for all practical purposes be stripped of NLRA protection and who could be fired with impunity at the first hint of union sympathy.

The second requirement of the *Haberman* test—that the employer has acted with an anti-union animus—is also flagrantly met in this case.[15] The record is replete with examples of Sure-Tan's blatantly illegal course of conduct to discourage its employees from supporting the Union. We have already concluded that the Surak brothers threatened, coerced and interrogated their employees in violation of sections 8(a)(1), 8(a)(3) and 8(a)(4). In a related proceeding, another panel of this court has held that Sure-Tan violated section 8(a)(5) of the Act by refusing to bargain with the Union after the INS granted voluntary departures to the five employees who are the subjects of this appeal. *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978). The close time relationships involved shed a clear light on Sure-Tan's motives. Sure-Tan sent the letter to the INS only *one day* after receiving the Regional Director's order overruling Sure-Tan's objections to the election and requiring Sure-Tan to bargain with the Union. Sure-Tan's deathbed conversion to enthusiastic enforcement of the immigration laws, which, of course, coincided with the Union's victory in the representation election, can hardly provide it with any defense under section 8(a)(3). In fact, in this case as probably in others the immigration laws

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[15] We note that proof of an anti-union motive is not required under the second part of the *Haberman* test when the employer's conduct is inherently destructive of employee rights. *Haberman*, 641 F.2d at 359-60. The employer's conduct in the instant case is properly characterized as inherently destructive of employee rights because Sure-Tan's letter to the INS, which lead to the voluntary departure of at least half of Sure-Tan's work force, effectively "jeopardize[d] the position of the union as bargaining agent or diminishe[d] the union's capacity . . . to represent the employees in the bargaining unit." *Haberman*, 641 F.2d at 359. Notwithstanding the attractiveness of this analysis, we think that in this case of first impression, we should carefully analyze Sure-Tan's allegations that no anti-union animus capable of supporting a section 8(a)(3) violation is present in this case.

have provided an employer with a powerful tool for unfair and oppressive treatment of migrant labor. The immigration laws have been conveniently employed to impose the ultimate penalty of discharge (and deportation or its equivalent) if migrant laborers should have the effrontery to join a union. As Chief Judge Cummings noted in our first *Sure-Tan* case, "it ill becomes the Company to argue after losing the election that certification would conflict with the immigration laws." 583 F.2d at 360.

We think the Board correctly concluded that Sure-Tan constructively discharged these five employees in violation of section 8(a)(3).

IV. *Remedy*

The most difficult problem presented on this appeal is the appropriateness of the relief ordered by the Board for the five constructively discharged alien employees. The ALJ concluded that the conventional remedy of backpay and reinstatement was "inadequate" in this case because the constructively discharged employees were illegal aliens "deported" to Mexico. 234 N.L.R.B. at 1192. In place of the conventional remedy, the ALJ recommended that the Board order Sure-Tan to mail letters to the five discriminatees at their last known addresses in Mexico, offering them reinstatement to their former or equivalent positions; these offers were to remain open for six months. The ALJ declined to recommend an award of backpay "[s]ince the above employees were not available for employment." 234 N.L.R.B. at 1192-93.

The Board refused to adopt the ALJ's recommended remedy. Noting that there was no evidence in the record supporting the ALJ's conclusion that the discriminatees have not returned to the United States, the Board concluded that the question of availablity for work should be determined in a compliance proceeding. Thus, the Board modified the ALJ's order by substituting the "conventional remedy of reinstatement with backpay." 234 N.L.R.B. at 1187.

The General Counsel subsequently filed a motion for clarification with the Board directed solely at the

remedy. Although admitting "that certain . . . remedial issues in this case may ultimately involve factual matters which are best resolved in a compliance proceeding," the General Counsel argued that Sure-Tan "is uncertain as to what its obligations are, and thus has questions concerning what it must do to achieve compliance." In particular, the General Counsel suggested that the Board's order might violate the national immigration laws and policies because it requires reinstatement and backpay without regard to the legality of the discriminatees' immigration status. Because he thought that such an interpretation "must be wrong," the General Counsel suggested that the Board adopt one of several other remedial formulas which would presumably not conflict with immigration laws or policies.

The Board denied the General Counsel's clarification motion. *Sure-Tan, Inc.*, 246 N.L.R.B. 788 (1979). Noting "that the remedial policies of the Act will be best effectuated in this case by affording the discriminatees full protection notwithstanding the circumstances attendant to their illegal discharge," the majority explained that the usual procedures governing the backpay and reinstatement claims, as implemented in a compliance proceeding, were both sufficient and appropriate for this case. 246 N.L.R.B. at 788. Members Penello and Murphy dissented, arguing that by failing to distinguish between lawfully and unlawfully resident discriminatees, the Board's order encouraged aliens to enter the country illegally to secure their reinstatement and backpay.

Upon the Board's application to enforce its order, Sure-Tan argues that the award of reinstatement and backpay, without regard to the immigration status of the employees seeking reinstatement, defeats the policies of our immigration laws and fails to carry out the policies of the NLRA. Sure-Tan also contends that a letter it sent to the five discriminatees offering them reinstatement "provided only that [their] reemployment shall not subject Sure-Tan, Inc. to any violations of United States immigration laws" was an unconditional offer of reinstatement and, thus, Sure-Tan has satisfied the Board's requirements in this regard. We separately consider each of these contentions.

A. *Propriety of Backpay and Reinstatement*

We reject Sure-Tan's argument that under the circumstances of this case an award of reinstatement and backpay cannot be reconciled with the laws and policies governing both immigration and labor relations. Sure-Tan's objection to the Board's remedial order, relying on the immigration laws, is premised in part on the assumption that the five discriminatees were deported. By awarding these "deported" discriminatees backpay and reinstatement, Sure-Tan contends that the Board has encouraged these aliens to re-enter the United States, even though the re-entry of deported aliens is a felony. *See* 8 U.S.C. § 1326 (1976). As we noted in section III, *supra*, the INS did not *deport* the discriminatees; rather, the INS granted to them the privilege of *voluntary departure*. General Counsel's Exhibits 20-25; *see* 8 U.S.C. § 1254(e) (1976). Aliens who depart voluntarily avoid the stigma of deportation and enhance the possibility of their lawful return to the United States at a later date. *Jain v. INS*, 612 F.2d 683, 686 n.1 (2d Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Strantzalis v. INS*, 465 F.2d 1016, 1017 (3d Cir. 1972) (per curiam); *Tzantarmas v. United States*, 402 F.2d 163, 165 n.1 (9th Cir. 1968), *cert. denied*, 394 U.S. 966 (1969).[16] Because these discriminatees were not deported, the felony provisions of 8 U.S.C. § 1326 are not applicable, and the Board correctly concluded that they might return lawfully to this

[16] Deported aliens may reenter the United States only if they first secure the Attorney General's consent for reapplication for admission. 8 U.S.C. § 1326(2) (1976). Aliens who voluntarily depart need not secure prior approval from the Attorney General before seeking admission; likewise they are not necessarily prohibited from reapplying for admission to this country. Indeed, there is nothing in the INS regulations governing the certification of temporary alien workers, such as the alien discriminatees in this case, that prohibits the INS from lawfully certifying these discriminatees for admission in the future upon reapplication notwithstanding a previous voluntary departure. *See* 8 C.F.R. § 212.8 (1981).

country to reclaim their positions at Sure-Tan.[17] The Board also determined that such a lawful return might take place soon.

It obviously remains a possibility, however, that the discriminatees in this case might be motivated to reenter the United States unlawfully to claim reinstatement and backpay. But, as a practical matter we believe it unlikely that a discriminatee would attempt to illegally enter the United States primarily to pursue his remedies and thus draw attention to his illegal alien status. Indeed, the economic and social attractions which generally encourage illegal migration to this country are probably more compelling inducements than the special fruit of the Board's order might be in this case. Thus, under the specific facts of this case, the Board's grant of the conventional remedy of backpay and reinstatement does not clearly flout the immigration laws (although here, as explained *infra*, we think that the Board's remedy should be modified in some aspects).

We also reject Sure-Tan's argument that backpay and reinstatement for these discriminatees would not carry out the purposes of the NLRA. Section 10(c) of the Act grants to the Board broad discretion in devising remedies for unfair labor practices. *See NLRB v. United Contractors, Inc.*, 614 F.2d 134 (7th Cir. 1980); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980). Sure-Tan correctly notes that in most cases where reinstatement orders are not upheld, the reinstated employees were guilty of unlawful or offensive conduct. *See, e.g., NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939);

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[17] This point also distinguishes the instant case from *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). In *Southern Steamship*, the Court held that the Board's remedial order of backpay and reinstatement for striking seamen was unenforceable because it conflicted with another statute prohibiting strikes or mutinies by seamen by encouraging these prohibited acts. In the instant case, the Board's order does not conflict with the immigration laws since it does not necessarily encourage or sanctify *illegal* immigration of the discriminatees from Mexico.

Nebraska Bulk Transport v. NLRB, 608 F.2d 311, 316-17 (8th Cir. 1979); *NLRB v. National Furniture Manufacturing Co.*, 315 F.2d 280, 286 (7th Cir. 1963). These authorities teach, however, that an employee's unlawful or offensive conduct, to be of significance, must relate directly either to his ability to perform his work duties or to the compatibility between employer and employee. The immigration violations of these discriminatees, though unlawful (and conceivably "offensive"), have no bearing on the employees' ability to perform Sure-Tan's work. Nor is there any showing (relating to immigration status or otherwise) that any basic antagonism exists which interferes with harmonious employer-employee relations.

Moreover, the purpose of backpay in cases such as this is to vindicate public policy by making employees whole for their losses caused by the employer's unfair labor practices. *NLRB v. J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969). It would be anomalous to encourage the honest toil of illegal aliens, accepting it with the understanding that these workers had the rights of employees under the Act, but then, when violations occur, to deny them such rights by refusing effective remedies. Indeed, the rights of *both* alien and non-alien employees under the Act are flouted if employers are free to discriminate against alien employees who exercise their right to form and join unions. This is precisely what happened here since Sure-Tan, by constructively discharging these alien employees, destroyed the bargaining unit and thus undermined the Union's support during the crucial period immediately after certification. Both reinstatement and backpay are justified under the circumstances to vindicate the policy of the Act and to deter similar conduct by other employers in the future.[18] We, however, believe that both branches of

[18] Sure-Tan also argues that the Board erred by determining that many of the remedial issues in this case, including the apparent conflicts between the Board's conventional remedy and the INA, should not be resolved until the Board's order is implemented in a compliance proceeding. In view of our dis-

(Footnote continued on following page)

this conventional remedy must be subjected to limitations as set forth *infra*.

B. *Sure-Tan's Offer Of Reinstatement and Modification of Conventional Remedy*

On March 29, 1977, Sure-Tan mailed letters to the five discriminatees. In these letters, Sure-Tan offered to reinstate each discriminatee, "provided ... that [his] reemployment shall not subject Sure-Tan, Inc. to any violations of United States immigration laws." Company Exhibit No. 1. The offer remained open until May 1, 1977. The letters were written in English and mailed to each discriminatee at his last known address in Mexico. There is not proof, however, that any of the discriminatees actually received Sure-Tan's letter.

The ALJ found that these letters did not constitute adequate offers of reinstatement. As part of his proposed order, the ALJ recommended that Sure-Tan make another offer of reinstatement (with receipt to be verified) to these employees, which would be kept open for a six month period. The Board, "[w]ithout passing on these points," found "that the [employer's] offers were deficient because they were expressly conditioned on [Sure-Tan's] not being found in violation of United States immigration laws." 234 N.L.R.B. at 1187 n.3. Sure-Tan contends that these letters were unconditional offers of reinstatement since the stated condition—reemployment which does not subject Sure-Tan to legal liability under the immigration laws—is not a legal impediment preventing reinstatement. We think that as a practical matter, Sure-Tan is correct in its contentions.

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[18] *continued*

position of this case, *infra*, we need not discuss these contentions. Nevertheless, we note that many other issues in this case, such as computation of the dollar amount of backpay and unavailability for employment (which may toll backpay) are usually determined only in compliance proceedings. *Zims Foodliner, Inc. v. NLRB*, 495 F.2d 1131 (7th Cir.), *cert. denied*, 419 U.S. 838 (1974).

When an unconditional offer of reinstatement is made to discriminatees who were discharged due to an employer's unfair labor practice, the employer's backpay liability is generally tolled from the time of the offer. *NLRB v. Huntington Hospital, Inc.*, 550 F.2d 921, 924 (4th Cir. 1977); *Kenston Trucking Co. v. NLRB*, 544 F.2d 1165 (2d Cir. 1976) (per curiam). In this case, the Board held that Sure-Tan's March 29 letters were *conditional* offers of reinstatement; thus, at the present time Sure-Tan has not yet, according to the Board, tolled its backpay liability.

Sure-Tan properly argues that the conditions expressed in its letter are not legal impediments barring the reinstatement of the discriminatees. Because an employer does not violate the immigration laws by employing an illegal alien, these discriminatees could not subject Sure-Tan to any legal liability by applying for, or receiving, reinstatement. Whether or not the "condition" contained in this reinstatement offer constitutes a legal impediment to these discriminatees does not, however, dispose of the issue before us. In determining whether a reinstatement offer is conditional or unconditional, we should not consider either the legal effect of the condition or even the employer's good faith in making the offer. Rather, we must focus on the understanding of an alleged condition by discriminatees who received the reinstatement offers. *See NLRB v. Murray Products, Inc.*, 584 F.2d 934, 942 (9th Cir. 1978).

Following this approach, we do not agree with the Board's determination that Sure-Tan's reinstatement offer would be understood by the discriminatees as a "conditional" offer of reinstatement. The discriminatees were well aware, at least after their voluntary departure (if not before), that they can legally work and reside in the United States only if they secure the proper visas and other authorizations. Therefore, the "condition" expressed in Sure-Tan's letter would in all likelihood be construed by persons in the position of these discriminatees as requiring them to enter the country legally before seeking reinstatement. Moreover, in a setting where anti-union animus is not present and since illegal entry would presumably represent just cause for

discharge, the employer may presumably refuse lawfully to rehire a previously discharged alien if the alien has not entered the country legally to reclaim his job. *See* 29 U.S.C. § 160(c) (1976).

This analysis points to a reconciliation of the remedies of backpay and reinstatement with the policies underlying the national immigration laws. As previously noted, we are not convinced that these conventional remedies (as applied here by the Board) would necessarily encourage illegal immigration. Nevertheless, particularly because of the attention now focused by the government on these discriminatees and their employer, it is appropriate for this employer to remind the discriminatees that they may not legally enter the United States to claim these jobs without proper documents. Despite its frailties of draftsmanship, we believe Sure-Tan's offer, at least for the purposes of this case, should be regarded as unconditional. Further, and consistent with our analysis of Sure-Tan's reinstatement offer, we think the Board's remedial order must be modified to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement.

On the other hand, we agree with the ALJ that Sure-Tan's letter did not give the discriminatees a reasonable time to consider the offer and make arrangements for legally entering the United States. *See NLRB v. Murray Products, Inc.*, 584 F.2d 934, 940 (9th Cir. 1978). But, we disagree with his recommendation that the offer be left open only for a six month period. Under the circumstances of this case (where legal re-entry into the United States may require years of effort), the offer should remain open for a period of four years to afford the discriminatees a liberal but reasonable opportunity to reclaim their jobs. Moreover, we agree with the ALJ that the offers made by Sure-Tan were inadequate because they were not delivered to the discriminatees in a manner allowing verification of receipt and they were not written in the discriminatee's native language (Spanish). Because its offers were defective to this extent, Sure-Tan must again make offers of reinstatement to the discriminatees consistent with this opinion and

the Board's order as we have modified it. The new offers, rather than the earlier ones, will terminate the possible accrual of backpay.

Consistent with our requirement that there be reinstatement only if the discriminatees are legally present and permitted by law to be employed in the United States, we modify the Board's order so as to make clear (1) that (except for the modification hereinafter permitted) in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States, and (2) that backpay need not be placed in escrow for more than one year.[19]

We have one further concern, in view of the statutory direction that the Board shall order such remedial action as will effectuate the policies of the Act. *See* 29 U.S.C. § 160(c). In the circumstances of this case it may well be that the discriminatees will not have been lawfully available for employment in the United States prior to the date of the new offers of reinstatement which will be required. In that event the discriminatees will receive no backpay. It seems to us that it would better effectuate the policies of the Act to set a minimum amount of backpay which the employer must pay in any event, because it was his discriminatory act which caused these employees to lose their jobs. Although later independent detection of them by INS would doubtless have had the same result, we think the Board could fix a time which is the minimum during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice. Although that period of time is obviously conjectural, we think that six

[19] The Board should utilize a slightly modified escrow procedure similar to the procedure followed in *NLRB v. Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963), *clarified*, 327 F.2d 958 (8th Cir. 1964), to insure that amounts deposited in escrow by Sure-Tan to comply with its backpay liability, if any, will be refunded if the discriminatees fail to make an application for backpay within one year.

months is a reasonable assumption. In any event, we believe six months' backpay is a minimum amount for purposes of effectuating the policies of the Act.

We will therefore enforce the Board's order as modified, but will give leave to the Board, if it sees fit, to modify it further by setting a minimum period of six months during which backpay will be awarded in any event, and we will also grant enforcement of the order as so modified.

ORDER ENFORCED AS MODIFIED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 12, 1982

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

No. 80-2448 *vs.*

SURE-TAN, INC., AND SURAK LEATHER CO.,
Respondent

Petition for Enforcement of an Order of the National Labor Relations Board.

ORDER

The Board has submitted a proposed judgment order pursuant to the court's opinion enforcing as modified the Board's findings of unfair labor practices committed by Respondents. *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982). Objections to the Board's proposal were filed by the Respondents appearing *pro se.* We adopt the proposed judgment order as modified herein.

Under the proposed judgment order submitted by the Board, the alien discriminatees would receive backpay (with interest) as traditionally computed by the Board. *See F. W. Woolworth Co.*, 90 N.L.R.B. 289 (1950). In addition, the

* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

proposed judgment order stated that "[i]f any of the discriminatees have not been located after the [four year] reinstatement period has expired, the Respondent will place in escrow money sufficient to satisfy its possible backpay liability, but such money will be refunded if the discriminatee has not been located within one year."

Although our opinion did approve an award of backpay to these discriminatees, the procedure established here by the Board for collecting these potential backpay awards does not fully accord with our modification of the Board's traditional remedy in this case. As we interpret the Board's proposed judgment order, the alien discriminatees could collect their backpay awards anytime within *five years* after Respondents make valid reinstatement offers (four year reinstatement period plus one year escrow periods). Moreover, backpay might continue to accrue during this period under the Board's proposed judgment order. It appears that in adopting this procedure, the Board probably followed its general rules regarding the tolling of backpay liability. The Board generally tolls backpay liability either when the discriminatee accepts reinstatement, rejects reinstatement, or, for discriminatees who do not reply, on the last day for accepting the reinstatement offer. *See American Manufacturing Co. of Texas,* 167 N.L.R.B. 520, 521 (1967). Since the Respondents here must keep the reinstatement offers open for four years, the Board might have concluded, under *American Manufacturing,* that Respondents' backpay liability could extend for four years, or, at least, that for the discriminatees who did not reply to the offer, the backpay period would be tolled at the end of four years, *i.e.*, the last day for accepting reinstatement under our modified remedy.

We declined, however, to apply the Board's traditional rule regarding the tolling of backpay liability in this case. In an effort to effectuate the policies of the NLRA, we extended the reinstatement period to four years—a period far exceeding the

typical reinstatement period in cases involving non-alien discriminatees. *See, e.g., NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 529-30 (3d Cir. 1977) (less than two weeks held reasonable period to hold open reinstatement offers). To extend backpay liability and the period for collecting backpay throughout this four year period would not effectuate the policies of the NLRA. Thus, we also provided in the opinion that the Respondents' backpay liability would be tolled *from the date the offers of reinstatement are made by Respondent.* 672 F.2d at 605.[1]

After the offers are made by Respondent, we assume that the Board will hold hearings within several months thereafter to establish the gross amount of backpay owed to these discriminatees. The Board is, of course, obliged, to the best of its ability, to make the discriminatees available for cross-examination by Respondents at this hearing to establish interim earnings and any other setoffs applicable to the backpay awards. *See N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).[2] The escrow procedure adopted in our opinion of February 24, 1982, would apply to those discriminatees who do not appear at the backpay hearing. If a claim is not made within one year, "the award shall be considered to have lapsed, and . . . the amounts of lapsed awards, if any, shall be refunded to respondents." *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447, 456 (8th Cir.

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[1] Section 2(b)(1) of the Board's proposed judgment order implicitly provides that the backpay period is not tolled until the discriminatees *receive* the reinstatement offers. We have modified this in accord with our opinion as discussed in more detail *infra.*

[2] Although the discriminatees are Mexican aliens, the Board may still secure temporary short-term visas for them to allow them to enter the country to testify at the hearing. The General Counsel successfully followed such a procedure when he secured the testimony of one of the discriminatees at the unfair labor practice hearing.

1963). Thus, the escrow period will arise after valid reinstatement offers are made and the hearing is held, and not at the end of the four-year reinstatement period.

Regarding the computation of backpay, we have also modified section 2(b)(1) of the Board's proposed judgment order to provide that a minimum of six months' backpay will be awarded on demand to each of the discriminatees regardless of the specifics of their lawful availability for employment during the backpay period. If a discriminatee was in fact lawfully available for employment, his backpay should be computed for the period of his lawful availability. If that period is less than six months, he should be deemed lawfully available for six months. Of course, if he was in fact lawfully available for more than six months, that period would be the relevant backpay period. Our opinion also expressed concern that some discriminatees might never recover any backpay because they would be unable to show that they were lawfully available for reemployment at any time during the backpay period. *See* 672 F.2d at 606. We invited the Board to adopt a procedure in this case to provide backpay for discriminatees in this situation, and we suggested that six months' backpay would be appropriate. After reviewing the proposed judgment order, we are uncertain whether the Board has adopted this suggestion. We have now concluded that the policies of the NLRA are furthered in this admittedly unique case only if discriminatees unable to show legal availability are nonetheless awarded a minimum of six months' backpay (of course subject to clearly mandatory and conclusively established setoffs, if any), and we have thus modified the Board's judgment order to effectuate this decision.

We do not fault the Board for misconstruing our intent in these matters. Admittedly, we did not consider these problems in detail in our opinion; we hope the instant order will provide detailed answers to outstanding questions. The Board's proposed judgment order, as modified, herein, is hereby adopted.

Modification

Section 2(b)(3) is modified as follows:

Respondent's backpay liability shall be tolled from the date valid offers of reinstatement are mailed to the discriminatees in accordance with the requirements of section 2(a). The Board will hold a hearing to determine backpay liability shortly after these offers are made. The Respondent will place in escrow money sufficient to satisfy its potential backpay liability for those employees who do not appear at the Board hearing, but such money will be refunded if the discriminatee has not been located within one year.

Section 2(b)(1) is modified as follows:

Before awarding any backpay, the Board will determine whether any of the discriminatees were lawfully available for employment during the backpay period (*i.e.*, between the date of their illegal constructive discharge and the date respondent mails valid offers of reinstatement). If a discriminatee was lawfully available for employment for a period of less than six months during the backpay period, he shall be deemed to have been available for at least six months. If a discriminatee was not lawfully available for employment at any time during the backpay period, he shall be deemed to have been legally available for employment for six months only for purposes of awarding backpay.

The Board will substitute these paragraphs at the appropriate places in the attached judgment order.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

NATIONAL
LABOR RELATIONS BOARD,
Petitioner,

v. No. 80-2448

SURE-TAN, INC. AND
SURAK LEATHER CO.,
Respondent.

JUDGMENT

Before: CUDAHY, Circuit Judge, FAIRCHILD, Senior Circuit Judge, and BROWN, Senior District Judge.*

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Sure-Tan, Inc. and Surak Leather Co., Chicago, Illinois, its officers, agents, successors, and assigns on March 6, 1978. The Court heard argument of respective counsel on September 30, 1981, and has considered the briefs and transcript of the record filed in this cause. On February 24, 1982, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's Order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Sure-Tan, Inc. and Surak Leather Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, support for, or activities on behalf of Chicago Leather Workers

* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter called the Union) by: threatening to notify the Immigration Service because of employees' support for the Union; notifying the Immigration Service and requesting a check on their status because of their support for the Union and thereby resulting in their deportation from the country and their constructive discharge; interrogating employees about their union sentiments and sympathies and that of their fellow employees; threatening employees with less work if they supported the Union; promising employees more work if they did not support the Union.

(b) Verbally harassing employees and issuing them written reprimands because of their attempts to obtain Board assistance and because they support the Union.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Francisco Robles, Ernesto Arreguin, Sacramento Serrano, Arguimino Ruiz, and Juan P. Flores immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. These offers must be written in Spanish, must provide that they remain open for four years after receipt, and must be delivered in a manner allowing verification of receipt. These offers must advise the discriminatees that Respondent has no obligation to reinstate them unless they are legally present in the United States and legally free to be employed when they offer themselves for reinstatement.

(b) Make these discriminatees whole for wages lost as a result of their unlawful discharge, subject to the following conditions:

(1) The discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States, except that any discriminatee who was lawfully available for employment in the United States for less than six months between the date of his discharge and the date he received the Respondent's valid offer of reinstatement will be deemed to have been so available for six months.**

(2) Backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

(3) If any of the discriminatees have not been located after the reinstatement period has expired, the Respondent will place in escrow money sufficient to satisfy its possible backpay liability, but such money will be refunded if the discriminatee has not been located within one year.

(c) Expunge from the personnel record of Albert Strong the letter of reprimand dated February 11, 1977.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(e) Post at its premises in Chicago, Illinois, copies of the attached notice marked "Appendix." Copies of said notice shall be in English and Spanish, on forms provided by the Regional Director Region 13 of the National Labor Relations Board (Chicago,

** To be modified as directed by the court's judgment order.

Illinois), and after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by other material. In addition, Respondent will mail a copy of such notice to the discriminatees at their last known address.

(f) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Circuit Judge, United States Court of Appeals for the Seventh Circuit

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT cause the constructive discharge of employees by requesting the Immigration and Naturalization Service to investigate the status of known illegal aliens because of their selection of and support for the Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL—CIO, or any other Union, with knowledge that such employees have no papers or work permits.

WE WILL NOT interrogate employees about their union sentiments and sympathies or that of other employees.

WE WILL NOT threaten employees who are illegal aliens with notification of the Immigration and Naturalization Service because of their selection or support of a union.

WE WILL NOT threaten employees with less work if they support the Union.

WE WILL NOT promise employees more work if they do not support the Union.

WE WILL NOT verbally harass employees or issue them written reprimands if they attempt to use the Board's processes or if they support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights protected under the National Labor Relations Act.

WE WILL offer Francisco Robles, Arguimino Ruiz, Juan P. Flores, Ernesto Arreguin, and Sacramento Serrano immediate and full reinstatement to their former jobs or, if these jobs no longer exist to substantially equivalent positions of employment without prejudice to their seniority or other rights and privileges, and pay them for loss of earnings suffered because of being constructively discharged on February 18, 1977.

WE WILL remove the reprimand of February 11, 1977, from the personnel records of Albert Strong.

SURE-TAN, INC. AND SURAK LEATHER CO.
(Employer)

Dated_____ By_____
(Representative) *(Title)*

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7597.

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2448

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SURE-TAN, INC., and SURAK LEATHER CO.,

Respondent.

On Petition for Rehearing and Suggestion for Rehearing *En Banc*

MAY 5, 1982

Before CUDAHY, *Circuit Judge*, FAIRCHILD, *Senior Circuit Judge*, and BROWN, *Senior District Judge.**

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* of 672 F.2d 592 (7th Cir. 1982), filed in the above-entitled cause by respondent, Sure-Tan, Inc. and Surak Leather Co., a vote of the active members of the Court was requested, and a majority of the active members of the Court did not vote

* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

to grant a rehearing *en banc.** All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

WOOD, *Circuit Judge*, with whom PELL and COFFEY, *Circuit Judges*, join.

In *Sure-Tan* I,[1] the majority held that illegal aliens, who had no right to be in this country and no right to hold a job, could nevertheless, by their vote in favor of the union as their bargaining agent, bind this business and its subsequent new employees. After voting, all those illegal alien employees, with considerable justified encouragement from the Immigration and Naturalization Service, returned home quickly, but left the business and its new employees to live with the union decision. *Sure-Tan* I was followed by the Ninth Circuit in *NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979), but I stand by my dissent in *Sure-Tan* I that the sensible solution, under these "unusual circumstances," would have been simply to hold a new election. As suggested in that dissent, what is needed is for Congress to act[2] to relieve some of the tension between labor and immigration policies.[3]

That original mistake in *Sure-Tan* I has now inevitably spawned related problems which had to be ad-

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* Circuit Judges Pell, Wood and Coffey voted to grant a rehearing *en banc*.

[1] *NLRB v. Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978).

[2] Duplicate bills were introduced on March 17, 1982 (S. 2222 and H.R. 5872), known as the Immigration Reform and Control Act of 1982, which appears to address at least some of these problems.

[3] *See* Comment, *Labor Law—Illegal Aliens are Employees Under 29 U.S.C. § 152(3) (1976) and May Vote in Union Certification Elections.* NLRB v. Sure-Tan, Inc., *583 F.2d 355 (7th Cir. 1978)*, 10 Rut.-Cam. L.J. 747 (1979).

dressed in *Sure-Tan* II. I do not and need not defend the motives of Sure-Tan management, but even *Apollo Tire Co.*, 604 F.2d at 1183, says an employer should report suspected illegal alien employees to the Immigration and Naturalization Service. The NLRB seems to use only its private knothole to view these issues and sees nothing except its own labor goals. I think this court instead of peering through the NLRB's knothole should look over the fence for a better understanding of the whole problem. If we did, I do not believe that the employers' notification to the Immigration and Naturalization Service would be construed as a "constructive discharge" so as to reward the illegal aliens for their illegal labor activities with possible reinstatement and back pay. Reinstatement would no doubt displace American workers at a time when unemployment is already high. Much of the rationale for this seems to be to punish the employer. Punishment of employers of illegal aliens, however, is for Congress, not for us.[4]

Rather than approve the majority's concocted remedy, I would, even if it took some stretching of the doctrine, simply consider this case moot when the illegal aliens "voluntarily" returned to their country. The company's new American workers should be able to decide for themselves what they believe to be in their own best interests. As it is, this court has given proxies to illegal aliens to cast votes for American workers and now has given the illegal aliens some encouragement to come back, displace our own workers and be awarded a back-pay bonus for doing it. At least the view of the majority may serve to inspire Congress to rescue us from this state of things which is of our own judicial doing.

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[4] For a current general discussion of the extent of the problem and pending legislation, see Comment, *Illegal Immigration: Employer Sanctions and Related Proposals*, 19 San Diego L. Rev. 149 (1981).

Therefore, I respectfully dissent from this court's unwillingness to consider this matter *en banc* and to keep us within realistic and sensible judicial bounds.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Sure-Tan, Inc. and Surak Leather Co. *and* Chicago Leather Workers Union, Local 431, United Food and Commercial Workers International Union, AFL-CIO.[1] Cases 13-CA-16117 and 13-CA-16229

December 5, 1979

ORDER DENYING MOTION

On March 6, 1978, the Board issued its Decision and Order in the above-entitled proceeding.[2] It adopted, *inter alia*, the Administrative Law Judge's finding that Respondent, in retaliation against union activities, constructively discharged five Mexican employees by requesting an Immigration and Naturalization Service investigation that led to the employees' immediate deportation. The Board reversed the Administrative Law Judge as to his recommended remedy for the 8(a)(3) discharges. The Administrative Law Judge assumed that the discriminatees were still in Mexico and thus physically unavailable for work. He therefore refrained from ordering any backpay. He also placed a 6-month time limit on the reinstatement offer. The Board held that the questions of availability and backpay liability should be answered in a compliance proceeding and ordered the conventional remedy.

On September 7, 1978, the General Counsel filed a motion for clarification and the Charging Party answered the motion on October 17, 1978. The General Counsel contends that the Board's Order does not distinguish between legal and illegal immigrant status of discriminatees and thus is contrary to

[1] The name of the Charging Party, formerly Chicago Leather Workers Union Local 431, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, is amended to reflect the change resulting from the merging of Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

[2] 234 NLRB 1187 (1978).

national immigration law and policy. The Board's Order is viewed by the General Counsel as encouraging deported discriminatees to return as quickly as possible to claim their jobs and backpay rather than wait until an uncertain date when they might be able to reenter the United States legally.

The General Counsel suggests that our Order be clarified to require an offer of reinstatement only to those discriminatees who are able to reenter the United States lawfully. He argues that backpay should accrue only from the time a lawfully returned discriminatee is denied employment after his return. The General Counsel concedes that this narrow reading of the Board's Order would leave in most deportation cases only the cease-and-desist provisions as a remedy.

The Charging Party responds to the General Counsel by arguing that the effect of the suggested clarification is to allow Respondent to discharge undocumented workers without incurring any backpay obligations. If Respondent is then able to replenish his work force with a new group of illegal aliens, a strong incentive is thus created for illegal migrations.

We have considered both the motion and the answer and we shall deny the motion for the following reasons. The Board is of the view that the remedial policies of the Act will be best effectuated in this case by affording the discriminatees full protection notwithstanding the circumstances attendant to their illegal discharge. They are to be offered unconditional reinstatement. The backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer. The usual procedures for handling the claims of missing discriminatees are to be used.[3] Discriminatees who are located but found to be unavailable for work (including unavailability because of enforced absence from the country) will have their backpay tolled accordingly.[4] In the event of long delays in

[3] Case Handling Manual (Part III), sec. 10584.2.
[4] *Id.*, sec. 10612-26.

locating the discriminatees, the backpay is to be placed in an escrow account for the normal 2-year period.[5] As we indicated in our Decision and now reaffirm, the appropriate forum for implementing the Order is in the compliance proceeding. We particularly note that the General Counsel's motion is unaccompanied by any showing of an effort to make the necessary factual determinations as spelled out above.[6]

We do not regard it as within our authority to alter the obligations imposed by the Act in a manner which might assist in reaching whatever may be the current goals of immigration policies, and we would be uncertain how to do so even if we considered it proper.[7] We reject Member Murphy's suggestion

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[5] *Id.*, sec. 10644.

[6] It is for this reason that Member Murphy's suggested remedial modifications in the name of "specificity and reasonable accommodation" are premature at best. Similarly, Member Murphy's assertion that the Board's remedy rests on a "fiction" would require for substantiation precisely the factual determinations as to locations and availability that a compliance proceeding would provide.

[7] *N.L.R.B.* v *Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979).

The dissents of Members Penello and Murphy fail to take into account the breadth of the court's holding. In agreeing with the Board's position that illegal aliens are employees within the meaning of Sec. 2(3) of the Act, the court enforces our Order for reinstatement and backpay. The court also states that our interpretation best harmonizes with Federal immigration laws in that absent Board jurisdiction employers would be encouraged to hire illegal aliens in order to evade their responsibilities under the National Labor Relations Act. This comports with our reasons for denying the General Counsel's motion in this case. The court refrained from requiring the Board to "delve into immigration matters, out of its field of expertise." We are in complete agreement with the court. Finally, we note that the court made no distinction as to the current lawful or unlawful immigration status of aliens whose

(Footnote continued on following page.)

that our expertise is called into question by a failure to appreciate the complexity of the issues. We note that it is Member Murphy who has presented national policy underlying the immigration laws as one-dimensional. She correctly states that competition between illegal aliens and natives for lower paid, lower status jobs often works to depress wages and working conditions. However, it may well be that the result of such competition is not necessarily or always detrimental to native workers. In this regard it has been argued that higher wages in certain industries may act to deprive natives of jobs by either driving the industry out of existence of by compelling major changes in technology.[8]

Southern Steamship Co. v. *N.L.R.B.*,[9] cited by our dissenting colleagues, teaches that our responsibility includes an obligation to accommodate the policies of the Act to other Federal statutes expressing equally important congressional objectives. The Court held in *Southern Steamship* that the Board abused its discretion by ordering reinstatement for unfair labor practice strikers whose strike activity violated a Federal anti-mutiny statute. However, in contrast to the facts of this case as developed *supra*, the Court grounded its holding on the judgment that the congressional intent underlying the statute in question was clear and unambiguous and, further, that the strikers' criminal conduct held a serious potential for violence. We are of the view that our Order for reinstatement and a

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(Footnote continued from preceding page.)

presence at the time the discrimination occurred was unlawful. Instead, the court affirmed our award of reinstatement to those who were allegedly unlawfully in the country when the discrimination occurred, without regard to whether their presence then or later was unlawful. Thus, Member Penello's distinction on this ground is untenable.

[8] Piore, "Illegal Immigration in the United States, Some Observations and Policy Suggestions," in "Illegal Aliens, An Assessment of the Issues" National Council on Employment Policy (1976).

[9] 316 U.S. 31 (1942).

compliance hearing to develop a factual record is not so imcompatible with immigration law so as to render it an abuse of our discretionary authority under the rule of *Southern Steamship*. We note particularly that at present there is no showing that any discriminatee has violated any of the criminal provisions of the Immigration and Nationality Act. Further, we are of the view that it is unnecessary at this time to tailor our remedy to the possibility that implementation of our Order would result in such violations. Therefore, at this stage of the proceedings, prior to any factual determinations by the Regional Office, the Board sees no reason to depart from the normal compliance procedures.

It is hereby ordered that the General Counsel's motion be, and it hereby is, denied.

MEMBER PENELLO, dissenting:

I cannot agree with my colleagues' decision to deny the General Counsel's motion for clarification of the Order we entered in this proceeding on March 6, 1978.[10] For I believe that the General Counsel has persuasively demonstrated that important Federal policies require us to clarify our Order to require Respondent to offer reinstatement only to discriminatees lawfully in the United States.

In our Decision and Order, we found that Respondent, in retaliation against the union activities of five of its Mexican employees, requested the Immigration and Naturalization Service to investigate their legal status. As a result, the employees were immediately deported. We concluded that Respondent had constructively discharged the employees in violation of Section 8(a)(3), and we ordered the normal remedy of reinstatement and backpay.

As the General Counsel points out in his motion, the reinstatement and backpay provisions of our Order, as presently

[10] 234 NLRB 1187.

written, do not distinguish between discriminatees who reenter the country lawfully and those who reenter unlawfully. As a consequence, a discriminatee may seek to return immediately to this country, without waiting until he may be able to do so legally, in order to enjoy the benefit of a Board-ordered job waiting for him here. Thus, absent clarification, our Order might encourage a discriminatee to reenter the country illegaly—conduct which constitutes a felony under United States criminal laws.[11]

In view of the foregoing, I believe that it is incumbent upon us to harmonize the policies of our Act with those of the Federal immigration laws.[12] I would therefore clarify our Order so as to require Respondent to offer reinstatement only to discriminatees lawfully in the country.[13]

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[11] 8 U.S.C. secs. 1325, 1326.

[12] See *Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31 (1942).

In *N.L.R.B.* v. *Sure-Tan, Inc. and Surak Leather Company*, 583 F.2d 355 (1978), where the Seventh Circuit enforced the bargaining order we entered against the same Respondent involved in the instant proceeding, the court found that the Board's Order was "not inconsistent with federal immigration laws." The court said that "here the lasting benefit goes not to the law violators—the aliens—but rather to the Union, which is not accused of wrongdoing." *Id* at 360, 361. The court expressly stated that issues of reinstatement and backpay were not before it. *Id.* at 358, fn. 3.

The majority's reliance on *N.L.R.B.* v. *Appollo Tire Co., Inc.*, 604 F.2d 1180 (9th Cir. 1979), is misplaced. The issue raised by the instant case was not before the Ninth Circuit in *Appollo Tire* because as the Board stated in its brief to the court, "The Company here has not contended that the employees here involved have been deported."

[13] Notwithstanding this clarification, the "cease and desist" aspect of our Order would remain intact and thus Respondent would be barred from repeating its discriminatory counsel if a court of appeals enforced our 8(a)(3) finding Respondent would be subject to contempt sanctions should it again resort to the tactics it employed here.

MEMBER MURPHY, dissenting:

In its Decision and Order of March 6, 1978,[14] the Board found that Respondent violated Section 8(a)(3) of the Act by constructively discharging five Mexican employees, who were illegal aliens, in retaliation for their union activities, and ordered reinstatement and backpay for those employees, giving the usual remedy for such violations. The constructive discharge of the five illegal aliens was the consequence of Respondent's request to the Immigration and Naturalization Service to investigate, which Respondent knew would result (as it did) in their deportation. Obvious problems of compliance therefore exist concerning availability of the deported employees.

The General Counsel's motion for clarification requests that the Board specify what Respondent's obligations are under the Order herein so that the compliance proceeding may deal with the question of whether Respondent has satisfied its obligations.

The General Counsel asserts that the intent of the Board's remedial order is unclear, that Respondent has legitimate questions concerning how or when it is required to reinstate and give backpay to the discriminatees, and that a circuit court on review may well have similar questions. The General Counsel states that the Order as issued requires reinstatement and backpay without regard to illegal alien status and that implementation of the Order would be contrary to national immigration policies and laws. Therefore, the General Counsel has suggested various alternative remedies which he believes would discourage Respondent from violating the Act but would not be in conflict with the Immigration and Nationality Act.

The majority of the Board is denying the General Counsel's motion because they "do not regard it as within our authority to alter the obligations imposed by the Act in a

[14] 234 NLRB 1187.

manner which might assist in reaching whatever may be the current goals of immigration policies. . . ."[15] They therefore interpret the existing remedial order as requiring the unconditional offer of reinstatement for the illegal aliens with backpay from the date of discharge to the date of a "*bona fide* reinstatement offer." I disagree.

The Board majority also states that while backpay will be tolled where employees are unavailable for work—including unavailability of illegal aliens who are not allowed to return to this country—its citation in footnote 3 to the Board's Casehandling Manual requires that Respondent's *obligation to the illegal aliens continues indefinitely* and if at any time any of the five employees again becomes available an offer of reinstatement must be made. Further, where discriminatees cannot be located, backpay is to be placed in escrow for a 2-year period.[16]

There is no doubt that the Board's Order in this case must be clarified. The uncertainties which Respondent has expressed

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[15] *N.L.R.B.* v. *Appollo Tire Co., Inc.*, 604 F.2d 1180 (9th Cir. 1979), cited by the majority for this proposition, did not involve illegal aliens who had been deported and hence is inapplicable to the facts herein. The majority claims that distinguishing *Apollo Tire* on these grounds "fails to take into account the breadth of the court's holding" the rationale for which the majority implies is applicable to all situations in which a Board Order comes into conflict with existing immigration laws. This is a very uncertain conclusion and one which goes beyond the issue before the court in that case and hence must go beyond the intent of the court; it is indeed a peculiar logic to apply *Apollo Tire* to the current proceeding simply because the court in reaching its conclusions failed to differentiate between illegal aliens situated in this country and those who were deported especially when the facts presented to the court did not involve individuals in the latter category.

[16] Member Penello dissents; he would grant the General Counsel's motion including a requirement that Respondent be required to offer reinstatement "only to discriminatees *lawfully* in the country." (Emphasis supplied.)

are very real. The majority's action in purporting to leave future determination to the compliance stage of the proceeding begs the question—neither Respondent nor the General Counsel knows what is required in order to comply with the Order here unless the Board informs them. To this extent I would grant the General Counsel's motion.

The majority's refusal to consider how the enforcement of the National Labor Relations Act (NLRA) may be effectuated in such a way as to fit in with the implementation of the current goals of immigration policies manifests an overwhelming indifference and insensitivity to other Federal law, either alone or as it may impact on the current labor and economic situation in this country. However, nothing in the NLRA or its policies gives the Board a special dispensation to ignore other legislation. Of course, the Board may not interpret other statutes and is not empowered to enforce any other legislation unless directed to do so by Congress.[17] We have not been so empowered as regards the Immigration and Nationality Act (INA), but it is incumbent upon us to take cognizance of other statutes and accommodate to them if we can. It is possible to do so here and I deem it essential in light of the common purpose of protecting employees.

Thus, the legislative purpose of the INA provisions which relate to illegal aliens is to prevent such aliens from entering this country to perform labor "because of the likely harmful impact of their admission on American workers."[18] Congress

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[17] See my dissenting opinions in *Westinghouse Electric Corporation*, 239 NLRB 106 (1978); *The East Dayton Tool and Die Co.*, 239 NLRB 141 (1978); *Safeway Stores, Incorporated*, 240 NLRB 836 (1979); *Automations & Measurement Division, The Bendix Corporation* 242 NLRB 62 (1979). *The Bendix Corporation*, 242 NLRB 1005 (1979); *Markle Manufacturing Company of San Antonio*, 239 NLRB 1353 (1979); *Kentile Floors, Inc.*, 242 NLRB 755 (1979).

[18] *Richard B. Peskiff* v. *Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir. 1974). cert. denied 419 U.S. 1038 (1975).

noted that this impact principally affects the lower paid, lower status jobs held by the young, blacks, and members of other minority groups who experience the highest unemployment rates and who can least afford such competition.[19] It is clear from this that although illegal aliens are clearly employees within the meaning of the Act and are entitled to its protection[20] this does not make them immune from the provisions of INA. Under these circumstances, for the Board to let this Order stand and leave for determination in compliance what action is needed would be to require the courts to do what the Board should be doing—reconciling the provisions and policies of the NLRA with those of the INA.[21]

Clearly we cannot allow the present Order of reinstatement of illegal aliens to remain in effect.[22] The remedy in this case is merely another situation in which the Board is indulging in the fiction that the discriminatees did not leave the labor market and are available for work despite the fact they are not in truth available at all. For they have been deported to Mexico and are very unlikely to return to this country *legally* in the foreseeable future. Similarly, in *M Restaurants, Incorporated,*

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[19] House Committee on the Judiciary, Illegal Aliens; Analysis and Background 93d Cong. 1st sess., 18 (1977).

[20] *Amay's Bakery & Noodle Co.*, 227 NLRB 214 (1976).

[21] See *Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S. 31 (1942), in which the Supreme Court affirmed the Board's unfair labor practice findings but would not enforce the remedy, finding it to be in conflict with another Federal law. Compare *Stein Printing Company*, 204 NLRB 17 (1973), and *Emerald Maintenance, Inc.*, 188 NLRB 876 (1971), in which the Board tailored its remedies to accommodate applicable state and Federal law.

[22] I disagree with the majority in holding that its Order for reinstatement would not be an abuse of the Board's discretionary power under the rule of *Southern Steamship, supra.* This Order would encourage deported discriminatees to return to this country by means outside the procedures of the INA, a result clearly in conflict with provisions of that statute.

d/b/a The Mandarian, 238 NLRB 1575 (1978), where the discriminatee had gone to Taiwan—*albeit* voluntarily—the same fiction was adopted despite the fact, as I pointed out in my dissent therein, that the law is clear "that a discriminatee who removes himself or herself from the job market and is not available for work for the employer is not entitled to backpay for such period."[23] I apply the rationale to illegal aliens.

I believe that a more realistic and practical approach is needed which recognizes the facts and the problems and takes cognizance of the rights of all parties. It is for this reason that I cannot agree with a remedy providing that offers of reinstatement be made only to persons who prove they are legally in this country. I do not believe in the use of internal passports for either citizens or aliens. The requirements of proving legal status is more suited to the ideology of a police state than a democracy. Nor is it within the Board's competence to determine the legal status of aliens. The Ninth Circuit, in discussing the jurisdiction of the Board *vis-a-vis* illegal aliens stated: "[W]e hesitate to require the Board to delve into immigration matters, out of its field of expertise. Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service. An employer who suspects that an employee is in the United States without proper authority should report this information to the INS . . . ."[24]

One possible way to meet the need for specificity and reasonable accommodation would be to limit the backpay period to the time from the date of discharge to the date of deportation, and to provide that the offer of reinstatement be made but that an acceptance thereof be made within a specified

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[23] See *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1216 (1961); *Gary Aircraft Corporation*, 210 NLRB 555, 557 (1974).

[24] See *N.L.R.B.* v. *Apollo Tire Co.*, *supra* at 1183.

reasonable period such as 2 weeks; if the employees did not report by the end of that period, the offer would expire.[25]

As is apparent from this discussion and from the varying views of the Board Members, there are many elements to be considered and reconciled, some of which are outside the expertise of the Board majority.[26] This is a situation in which the Board should employ a rulemaking procedure to determine the appropriate remedy in circumstances like these. Affected parties could be heard, disparate elements considered, and a remedy fashioned that would meet not only the demands of this proceeding but could be applied in the future to similar fact situations.[27]

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[25] The majority asserts that my suggested "remedial modifications in the name of 'specificity and reasonable accommodation' are premature at best." However, I do what the majority is unwilling to do. Namely, I set out a compliance procedure which recognizes the realities, thereby avoiding the wasted motion of a scenario in which what is sought and what can be had bear little if any relationship to each other. The majority, by indulging in a fiction and extending the fiction into a compliance proceeding, merely defers decision of this inevitable issue and provides guidance for neither Respondent, the General Counsel, nor the general public.

[26] My colleagues obviously misconstrue my views as to what removes this matter from the Board's expertise—the complexity of the issues would be unimportant if Congress had delegated that function to this board. Whether the presence of illegal aliens is in fact advantageous to the well-being of our country is a question to be decided by Congress and is not within the purview of the NLRA. Congress has determined that the employment of illegal aliens is detrimental to our Nation's best interests and has authorized, within the provisions of the INA, an immigration procedure which will sustain this policy. Where application of Board law comes into conflict with the intent or the provisions of the INA, then the Board must reconcile the two statutes without intruding into another agency's functions.

[27] See S Rept. 95-628, *inter alia.* Labor Reform Act of 1978. 95th Cong. 2d sess., 18 20 (1978), in which the Board is

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I urge my colleagues to recognize the detrimental effect illegal aliens have on our legal work force and to resolve this problem—which is monumental in certain parts of our country—in the due process manner I have set forth herein.

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chided for not making more extensive use of its existing rulemaking authority.

UNITED STATES OF AMERICA
Before the National Labor Relations Board

SURE-TAN, INC. AND SURAK LEATHER COMPANY

CASES 13-CA-16117
13-CA-16229

GENERAL COUNSEL'S MOTION FOR RECONSIDERATION

JOHN S. IRVING
General Counsel

Washington, D. C.

GENERAL COUNSEL'S MOTION FOR RECONSIDERATION

On March 6, 1978, the Board issued its Decision and Order in this case, finding, *inter alia*, that Respondent had constructively discharged five of its Mexican employees in violation of Section 8(a)(3). The Board found that Respondent, in retaliation against the union activities of these employees, requested an investigation by the Immigration and Naturalization Service (INS), and this investigation resulted in the employees' immediate deportation.

With respect to the remedy for this violation, the Board disagreed with the recommended order of the Administrative Law Judge. The Judge had ruled that the reinstatement order should be held open for a six-month period because "the inability of the discriminatees to return to the United States rendered reinstatement 'at best an unlikely prospect.'" He declined to order backpay because "the deported employees were physically unavailable for work." The Board viewed the Judge's analysis as "unnecessarily speculative," and said that these issues should be decided in a compliance proceeding. It therefore reversed the Judge's failure to grant "the conventional remedy of reinstatement with backpay."

We recognize that certain of the remedial issues in this case may ultimately involve factual matters which are best resolved in a compliance proceeding. However, there are other issues herein which deal with the very meaning of the Board's order, and we believe that these other issues should be decided now. Phrased differently, a compliance proceeding can deal with questions concerning whether a respondent has complied with its obligations under a Board order. However, the order itself should make plain what these obligations are. In the instant case, the Respondent is uncertain as to what its obligations are, and thus has questions concerning what it must do to achieve compliance. We believe that the Respondent's questions are legitimate and that compliance would be aided if the Board

were to clarify the intendment of its remedial order. Further, we believe that a circuit court, which would review the Board's order before any compliance proceeding, may well have similar questions concerning the meaning of the Board's order. Accordingly, we seek clarification of that order.

Respondent contends that the Board order does not require it to offer reinstatement to discriminatees who re-enter the United States unlawfully. Similarly, Respondent argues that backpay should not run during times when the discriminatee is out of the United States and during times when the discriminatee is in the United States but unlawfully so.

Although the Board order, on its face, appears to require reinstatement and backpay without regard to the discriminatee's illegal alien status, we have some question as to whether the Board intended this result. For, as we show below, such a result would be clearly contrary to national immigration policies and laws.

If the Board order is construed to require reinstatement and backpay without regard to status, it would surely encourage a discriminatee to return to the United States, since there would be a Board-ordered job for him here. Similarly, if mere physical presence in this country is sufficient to trigger the running of backpay, the discriminatee would be encouraged to return in order to obtain this benefit. As a practical matter, a discriminatee would be encouraged to return to the United States illegally, so that he could reap these job and monetary benefits as soon as possible, rather than postpone and perhaps give up these benefits entirely by delaying his return until that uncertain day, far in the future, when he *may* be able to enter the United States lawfully.

Thus, the Board's order, so construed, would encourage illegal migration. Because of this, the General Counsel of INS has indicated to us his grave concern about this possible construction of the order. He also advises us that the reentry of

deported individuals constitutes a felony on their part under 8 U.S.C. 1325. In sum, he believes that the Board order, so construed, would encourage migration that is offensive to national immigration policy and in violation of United States criminal laws.

For these reasons, the Board may wish to clarify its order so as to require only that Respondent offer reinstatement to a discriminatee, provided that he reenters the United States lawfully.[1] In our view, the offer should have no time limitation, so that a discriminatee could accept it at any time in the future when he can satisfy the condition. As to backpay, if the offer were sent while the discriminatee was out of the United States and honored when the discriminatee lawfully returned to the United States, no backpay liability would accrue.[2] If the offer were sent while the discriminatee was out of the United States and then dishonored when the discriminatee lawfully returned to the United States, backpay would accrue from the time that the offer was dishonored. If no offer were sent, backpay would accrue from the time that the discriminatee lawfully reentered the United States.[3]

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[1] It appears that Respondent is ready to make such a conditional offer.

[2] Since the discriminatees in this case were deported almost immediately after they were apprehended, virtually no backpay accrued at that time. As we understand it from INS officials, this is usually the case. That is, in the typical case, after INS apprehends the person involved, he admits his illegal alien status and he is deported forthwith. If the person does not admit his status, the matter is set for an immediate hearing to determine status. In our view, the backpay in this latter situation would terminate as and when there is an INS finding that the person is an illegal alien or as and when the person does not appear for his hearing.

[3] Of course, even if the discriminatee returned to the United States unlawfully, an employer's refusal to employ him on the asserted grounds that he is an illegal alien might

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We recognize that this more narrow construction of the Board order diminishes to some extent the effectiveness of the remedial relief. We are advised by INS that, as a practical matter, it is highly unlikely that an illegal alien-discriminatee who has been deported will ever return to this country lawfully in order to take advantage of such a conditional offer of reinstatement.[4] Moreover, the amount of backpay awarded in most instances will be *de minimus*.[5] Thus, as a practical matter, there would be neither reinstatement nor backpay for the discriminatee. In view of this, we have considered some counter-arguments which could be made in support of more meaningful relief.

It could be argued, for example, that backpay should run from the time of the constructive discharge until the time when the employee lawfully enters the United States and is reinstated by the Employer. The basis for such a backpay award would be that, but for the Employer's discriminatory action, the employee would not have been deported and would have continued working for the Employer. However, in view of the very slim likelihood that the employee will ever lawfully reenter the United States, the backpay would probably run *ad infinitum* and may therefore be regarded as punitive. A variant of this is that backpay would run from the time of the constructive discharge until the time when INS agents, acting in normal course and without a "tip" from the Employer, would have

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constitute a new violation, if it were shown that the employer had otherwise continued its policy of knowingly hiring illegal aliens and that its asserted grounds for the refusal to hire was a pretext designed to mask an unlawful reason.

[4] Among the problems that must be surmounted are the existence of Congressionally imposed quotes, the limited number of State Department visas available to aliens from various countries, and the required employment certification of each such alien by the Department of Labor.

[5] See n. 2 *Supra*.

apprehended these illegal aliens. The basis for such a backpay award would be that, but for the Employer's discriminatory action, the employee would not have been deported until that time. However, the fixing of that point in time would be pure speculation. If the burden were on Respondent to prove when in time that point was reached, the likelihood is that Respondent would be unable to do so, and thus backpay would run *ad infinitum* and would arguably be punitive. Still another possibility would be for the Board to forbid the Employer from knowingly hiring illegal aliens again. Under such an order, the Employer would perforce not be able to repeat the discriminatory acts of the kind involved herein. Further, such an order might have a beneficial impact on those employers who thrive on employing illegal aliens. These employers might be induced to refrain from committing discriminatory acts of the kind involved herein, since to do so would result in their losing the ability to hire illegal aliens. However, such an order would be of no value to the discriminatees in this case. Further, it would involve the Board in policing what is essentially an INS function. Indeed, the Board would be going even further than INS, since at present an employer does not violate federal law by hiring illegal aliens.

In view of the foregoing, we believe that the more narrow construction of the Board's order is appropriate. Although it has remedial deficiencies, the alternatives have grave problems, including the problem of directly offending national immigration policies and laws. Further, the Board order, even as narrowly construed, is not devoid of remedial sanctions. Under the "cease and desist" provisions, the Employer is forbidden from repeating its discriminatory conduct. Thus, assuming court enforcement, the Employer would bear the sanctions of contempt if it responded to future organizational drives as it did here. Such prophylactic relief, coupled with notices to employees, should operate to preclude further misconduct and to inform employees of their Section 7 rights.

Based on the above, we believe that the Board should clarify its order as discussed herein.[6]

Respectfully submitted,

JOHN S. IRVING
John S. Irving
General Counsel

Dated at Washington, DC this
7th day of September 1978

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[6] The Board's decision in *Amay's Bakery & Noodle Co.*, 227 NLRB 214, presents a problem different from the one here. There, the employer argued that reinstatement of illegal aliens would place the employer in violation of state law. The Board demonstrated that this may not be the case. The problem discussed herein is that reinstatement of illegal aliens would be offensive to well defined federal policies and, for the returning discriminatee, offensive to federal criminal law. We submit that the Board should take this into account. See *Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S. 31 (1942).

On August 25, 1978, the Court of Appeals for the Seventh Circuit enforced the Board's bargaining order which was entered by summary judgement at 231 NLRB No. 32. In doing so, the Court made it clear that it was not considering any reinstatement and backpay issues. See n. 3 of slip opinion. However, the opinion does suggest that the Court might well be disinclined to order reinstatement and backpay for illegal aliens. Thus, it noted that the benefit of the certification and bargaining order involved in that case would extend "not to the law violators—the aliens—but rather to the Union. . . ." Moreover, the Court recognized the need to harmonize the NLRA with immigration policies. Thus, the Court pointed out that the certification and bargaining order "are not inconsistent with federal immigration laws." See p. 7 of slip opinion. Indeed, the Court noted that a refusal to uphold the certification would hinder the effectuation of these laws. See p. 8 of slip opinion.

UNITED STATES OF AMERICA
Before the National Labor Relations Board

SURE-TAN, INC. AND	CASES 13-CA-16117
SURAK LEATHER COMPANY	13-CA-16229

ERRATUM

The Motion that was filed in this matter on September 7, 1978, was inadvertently denominated a "Motion for Reconsideration". As the Motion makes clear, it should have been denominated "Motion for Clarification". Accordingly, where the former phrase appears (cover page, page 1, and Certificate of Service), it should be changed to the latter phrase.

Respectfully submitted,

JOHN S. IRVING
John S. Irving
General Counsel

Dated at Washington, DC this
8th day of September 1978

Sure-Tan, Inc. and Surak Leather Co. *and* Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Cases 13-CA-16117 and 13-CA-16229

March 6, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On November 3, 1977, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions. The Charging Party and the General Counsel each filed exceptions with a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Adminis-

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

The Respondent has also excepted to the Administrative Law Judge's recommendations as to certain issues as prejudicial and showing partiality. After a careful examination of the entire record, the exceptions, briefs, and the Decision of the

(Footnote continued on following page.)

trative Law Judge and to adopt his recommended Order, as modified.

The Administrative Law Judge correctly found that the Respondent committed several violations of Section 8(a)(1) of the Act during the last quarter of 1976 and also violated Section 8(a)(1), (3), and (4) in February 1977 with respect to employee Albert Strong. However, the Administrative Law Judge inadvertently omitted from his recommended Order an appropriate remedy for the unfair labor practices directed against Strong. We will therefore order the Respondent to cease and desist from verbally harassing its employees and from issuing them written reprimands because they attempt to use Board processes or because they support the Union. The Order will also be modified to require the Respondent to expunge the reprimand from Strong's personnel records.

The Administrative Law Judge also found, and we agree, that the Respondent constructively discharged five of its Mexican employees in violation of Section 8(a)(3) of the Act. The Respondent, with full knowledge that the employees in question had no papers or work permits, requested the Immigration and Naturalization Service to investigate their status. This investigation, which resulted in immediate deportation proceedings, was requested solely because the employees supported the Union.

We differ, however, with the Administrative Law Judge as to the appropriate remedy. He began his discussion with the settled proposition that illegal aliens are employees within the meaning of the National Labor Relations Act and are entitled

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(Footnote continued from preceding page.)

Administrative Law Judge, we are satisfied that this allegation is without merit. The Administrative Law Judge inadvertently referred twice to the representation election as having been held on December 10, 1977. The correct date was December 10, 1976. The references are in the fourth paragraph of sec. II,B,1, and in the Conclusions paragraph of sec. II,B, of the Decision.

to its protection.[2] However, the Administrative Law Judge's recommended Order departs significantly from the conventional remedy for a violation of Section 8(a)(3).

The Administrative Law Judge recommended that a reinstatement order be held open for a 6-month period because he was of the opinion that the inability of the discriminatees to return to the United States rendered reinstatement "at best an unlikely prospect."[3] In addition, the Administrative Law Judge declined to order any backpay because of his finding that the deported employees were physically unavailable for work.

The Board is of the view that the Administrative Law Judge's analysis of the remedy was unnecessarily speculative. While it is not disputed that the discriminatees were deported in February 1977, there is no evidence in the record that they have not returned to the United States. The appropriate forum for determining the issues relating to their availability for work is a compliance proceeding.

Based on the foregoing, we find that the Administrative Law Judge erred in failing to grant the conventional remedy of reinstatement with backpay.

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[2] *Amay's Bakery and Noodle Co., Inc.* 227 NLRB 214 (1976).

[3] The Administrative Law Judge found that the Respondent's reinstatement offers of March 29, 1977, were deficient for two reasons. First, the time limit given for acceptance, 1 month, was too short in light of the difficulties the discriminatees would face in lawfully reentering the United States. Secondly, since a foreign mail service was involved, there was good reason to question the usual presumption that the offers were ever received. Without passing on these points, we find that the offers were deficient because they were expressly conditioned on the Respondent not being found in violation of United States immigration laws.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Sure-Tan, Inc. and Surak Leather Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b) and reletter paragraph 1(b) as 1(c):

> "(b) Verbally harassing employees and issuing them written reprimands because of their attempts to obtain Board assistance and because they support the Union."

2. Substitute the following for paragraph 2(a) and reletter remaining paragraphs accordingly:

> "(a) Offer Francisco Robles, Ernesto Arreguin, Sacramento Serrano, Arguimino Ruiz, and Juan P. Flores immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, incurred as a result of being constructively discharged on February 18, 1977. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)
>
> "(b) Expunge from the personnel record of Albert Strong the letter of reprimand dated February 11, 1977.
>
> "(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment

records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT cause the constructive discharge of employees by requesting the Immigration and Naturalization Service to investigate the status of known illegal aliens because of their selection of and support for the Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL—CIO, or any other union, with knowledge that such employees have no papers or work permits.

WE WILL NOT interrogate employees about their union sentiments and sympathies or that of other employees.

WE WILL NOT threaten employees who are illegal aliens with notification of the Immigration and Naturalization Service because of their selection or support of a union.

WE WILL NOT threaten employees with less work if they support the Union.

WE WILL NOT promise employees more work if they do not support the Union.

WE WILL NOT verbally harass employees or issue them written reprimands if they attempt to use the Board's processes or if they support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights protected under the National Labor Relations Act.

WE WILL offer Francisco Robles, Arguimino Ruiz, Juan P. Flores, Ernesto Arreguin, and Sacramento Serrano immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions of employment without prejudice to their seniority or other rights and privileges, and pay them for loss of earnings suffered because of being constructively discharged on February 18, 1977.

WE WILL remove the reprimand of February 11, 1977, from the personnel records of Albert Strong.

SURE-TAN, INC. AND
SURAK LEATHER CO.

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard in Chicago, Illinois, on August 1 and 2, 1977, on complaints issued on February 22, 1977, and March 23, 1977, alleging that Respondent discriminatorily discharged five employees by questioning the legality of their presence in the United States with the Immigration and Naturalization Service because of the employees' union activities and sympathies and thereby caused their deportation. Respondent is further charged with engaging in various threats and promises to employees in order to discourage employees from engaging in union or protected concerted activities in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings:

FINDINGS OF FACT

I. JURISDICTION

The complaint as amended at the hearing alleges and Respondent admits that Respondent Sure-Tan, Inc., is an Illinois corporation engaged in the business of tanning hides, and that V. J. Surak and S. S. Surak,[1] herein called Surak Leather Co., are co-partners engaged in the purchase and sale of hides.

It is further alleged that Respondent Sure-Tan, Inc., and Respondent Surak Leather Co. (hereafter jointly referred to as Respondent), at all times material herein, are affiliated businesses with common officers, ownerships directors, and operators that constitute a single integrated enterprise; and that said directors and operators formulate and administer a common labor policy for the aforementioned businesses. Despite Respondent's denial that said businesses constitute a single integrated enterprise, the Board specifically found in a prior case, *Sure-Tan, Inc. and Surak Leather Co.*, 231 NLRB 138 (1977), that Respondent was a single enterprise and an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and such finding was based on the same evidence as was submitted in this proceeding. In view of the Board's prior holding, and the evidence submitted herein, I find and conclude that Respondent is a single integrated enterprise and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find that the Union, Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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[1] V. J. Surak is generally identified in the record as John Surak. S. S. Surak is Steve Surak for purposes of this proceeding.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

It is undisputed that a representation election was held on December 10, 1976, which was won by the Union. Respondent filed objections to the election alleging, *inter alia,* that the Board should not certify a bargaining unit largely composed of aliens illegally in the country or, at the least, whose legal status is questionable. On January 17, 1977, the Acting Regional Director overruled the objections and certified the Union. The Supplemental Decision on objections was received by Respondent on January 19, 1977, and, on the following day, January 20, 1977, Respondent sent the following letter (G.C. Exh. 18) to the Immigration and Naturalization Service:

January 20, 1977

Mr. Robert Esbrook
U. S. Immigration Service
Room 385
219 So. Dearborn
Chicago, Illinois 60604

Dear Sir:

We would like to ask you to check the emigration [sic] status of several [of] our employees, who are Mexican nationals:[2]

Juan P. Florez, also known as Jose Martinez, Social Security Number 338-50-1497

Francisco Robles, Social Security Number 466-11-2550

Ernesto Arreguin, Social Security Number 357-48-2329

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[2] The letter listed several other Mexican nationals who were not listed as they are not involved in the allegations herein.

Sacramento Serrano, Social Security Number 236-47-5634

Arguimiro Ruiz, Social Security Number 548-06-8995

We appreciate your attention to this request as soon as possible.

Yours very truly,

SURE-TAN, INC.
V. J. Surak

On February 18, 1977, Immigration Service agents visited the premises of Respondent and reviewed the immigration status of the Spanish-speaking employees and, shortly thereafter, those found to be illegally in the country, which included the five alleged discriminatees listed in the above letter, were promptly put aboard a bus and deported to Mexico.

B. *Case 13-CA-16117*

The substantive allegations of this complaint (par. VI, subpars. (a)—(e) of par. VI), allege essentially that Respondent: threatened employees with less work if they supported the union; promised employees more work if they did not support the Union; interrogated employees about their and their fellow employees' union sympathies and activities; threatened to call the Immigration Service because employees had supported the Union; threatened to discharge employees and close the plant if the Union won the election and promised employees a wage increase if the Union lost the election; threatened to go out of business because the Union won the election.

Francisco Robles, an employee and admitted illegal alien, credibly testified that in October, 1976, prior to a representation election held on December 10, 1976, John Surak approached him at his workplace and showed him a piece of paper with squares marked yes and no. Pointing to where the yes

appeared Surak stated "Union no good. Little work." Surak then pointed to where the no square appeared and stated "the company is good. A lot of work there." Surak then made a cross where the no appeared and said, "OK Francisco," and Robles replied, "OK."

Robles further testified credibly that approximately a week before the scheduled representation election of December 10, 1976, Surak approached employee Primitivo Servantez who was working with Robles and attempted to give him similar advice about voting no union. After receiving no answer Surak came to Robles and told him to tell Primitivo in Spanish. Robles then told Primitivo the same thing Robles had previously been told, namely, that in voting as to the Union the yes square was "no good, little work" and that the no square "is good, a lot of work." Robles further related that he told Primitivo that John (Surak) wanted him to put a cross on the square with the word "no."

Robles also testified credibly that, an hour or two after the election in which the Union was selected, John Surak approached him and employees Ruiz and Primitivo and said, "no friends, no amigos," said "sons of a bitches" and used the word "immigration." Surak then stated "Union, why?" and then said "Mexican son of a bitch." Surak then asked Robles if he had immigration papers and Robles answered no. Then Surak asked if the others had papers and Robles responded he did not know. Primitivo then told Robles to tell Surak that nobody had papers there and Robles conveyed that information to John Surak.

Floriberto Rodriguez, an employee of Sure-Tan from March through October 28, 1976, credibly testified that, in August 1976, John Surak approached him and a group of fellow employees and in half-English and half-Spanish asked several times of the group, "you all union?" Rodriguez responded on behalf of the group that he did not know anything about the Union, whereupon Surak said, "You are all son of a

bitches," and left. Rodriguez further testified that he attended a National Labor Relations Board hearing in October 1976 and that, subsequent to that hearing, John Surak was helping him put some chemicals in a container and Surak told him that he was stupid and that he and the Union were sons of bitches. Whereupon, Rodriguez said he did not want to work for Surak anymore and asked for and received his check and left the job. Rodriguez's resignation from the job as well as the October incident are not alleged to be violations and that testimony was admitted as background evidence of union animus.

1. The affidavits of deported aliens

Introduced and accepted into evidence were the affidavits of three alleged discriminatees, Aguimino Ruiz, Ernesto Arreguin, and Sacramento Serrano. They were deported from the country on or about February 18, 1977, to their native country, Mexico, because they were found by the Immigration and Naturalization Service to be in the country illegally. They were unavailable to testify for this hearing despite efforts to locate them and have them return to testify. Counsel for the General Counsel, William Kocol, stated that the affidavits were made before him and a Spanish-speaking interpreter; that, because of their prompt deportation, there was an insufficient time to procure depositions which would have afforded Respondent's counsel opportunity to cross-examine; and, lastly, that Respondent's objection to the introduction and consideration of these affidavits for this case has no merit because it was Respondent's action in writing the Immigration Service that led to their deportation and consequent unavailability for this hearing. Respondent's objection to the admissability of the affidavits centers largely on the inability to cross-examine the individuals concerned and states that deportation of such individuals was by the Government, and specifically by the Immigration and Naturalization Service, because they were in the country illegally.

It is clear that Respondent through its principal agent, John Surak, was aware that most of his employees were illegal aliens[3] and, in fact, objected to a representation election because of that fact. The day following the receipt of a supplemental report on objections issued by the Regional Director for Region 13 which report overruled Respondent's objections to the election, John Surak wrote the Immigration Service asking that an investigation be made of the legality of the status of certain of his employees. It is clear and I find that Respondent's request to the Immigration Service was prompted by his employees' selection of a union as their bargaining representative and that Respondent's action resulted in the deportation of the five named discriminatees involved in this case.

Nonetheless, I note that Francisco Robles was located and testified in this hearing despite his deportation. This gives support to the view that the individual discriminatees may have personally decided not to return for this hearing. Secondly, while the request from Respondent was the proximate cause of their deportation, it was the Immigration Service that determined they were here illegally and who did the actual deportation. Thirdly, the affidavits are clearly hearsay and do not give Respondent the opportunity to cross-examine the individuals, normally a procedural prerequisite to use as evidentiary material. Lastly, the affidavits of both Ruiz and Arreguin[4] merely

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[3] In addition to the objections to the election on the basis the employees were illegal aliens, subsequent to the election of December 10, 1976, V. J. (John) Surak, on January 10, 1977, executed an affidavit (G.C. Exh. 32) in which he stated that a couple of months before the election he was told by a confidential source that these men (the employees) were here illegally. Further, the statement acknowledged that, a week or so after the election, John Surak asked employees if they had a "green card" and each of the employees told him no. John Surak's contrary testimony, which he later modified, is not credited.

[4] G.C. Exhs. 19 and 30. The affidavit of Serrano is G.C. Exh. 31.

recounts incidents of interrogation or instructions to vote no in the election, both matters which would be merely cumulative in light of credited testimony of Robles and Rodriquez to the same effect. The affidavit of Serrano does relate explicit threats of discharge if the employees voted for the Union and a promise of a 20-cent-wage increase if the Union were not voted in. Nonetheless, such explicit threats would be remedied by the order herein since they fall within the general category of threats for supporting the Union or promises of benefit if the Union is not supported. Accordingly, for all of the above reasons, I conclude that use of the affidavits of Ruiz, Arreguin, and Serrano as evidentiary material is questionable at best and unnecessary, in any event, to remedy the substance of the allegations of the complaint. Accordingly, in making my findings herein, I do not rely on such affidavits.

Albert Strong, another employee of Sure-Tan, credibly testified that shortly after the election results were known on December 10, 1977, John Surak came to him and said, "Your dream finally come true . . . but I won't stay in business." Strong merely responded "OK."

John Surak was hesitant, unimpressive, and at times evasive in his denials of any statements by him to employees involving interrogation of his employees and threats and promises of benefit if they voted no union in the representation election. Accordingly, I do not credit such denials, nor any of his testimony which is contrary to that which I have credited.

Conclusions

In view of the credited testimony, I find that Respondent, through its supervisor and agent, John Surak, violated Section 8(a)(1) of the Act by: (a) threatening employees, in October 1976, with less work if they supported the Union and promising employees more work if they did not support the Union; (b) interrogating employees, in October and December 1976, about

their union sentiments and views and the union sentiments and activities of other employees; (c) threatening to notify the Immigration Service by asking employees shortly after the representation election on December 10, 1977, if they had papers or "green cards" and mentioning "immigration" thus constituting a thinly veiled threat to notify the Immigration Service because they had supported the Union; (d) on or about December 10, 1976, threatening to go out of business because the Union won the election.

C. *Case 13-CA-16229*

The complaint in this case alleged that Respondent caused the discharge of five employees by writing the Immigration and Naturalization Service and asking them to check their status which resulted in their deportation and that such action was motivated by the employees' support for the Union. The complaint further alleges that Respondent, through its agent John Surak, threatened and harassed and subjected to verbal abuse an employee (Albert Strong) on February 4, 9, and 11, 1977, including a written warning letter because the employee had engaged in union and/or protected concerted activities or because the employee was named in a charge filed under the Act and/or because such employee had given testimony to the National Labor Relations Board.

In view of the 8(a)(1) violations I have previously found in Case 13-CA-16117, and General Counsel's Exhibit 18, the letter dated January 20, 1977, from Respondent to the Immigration Service, the text of which was cited previously, I find and conclude that Respondent's request to investigate the immigration status of its employees was motivated by its employees' support of the Union. I further conclude that the discriminatees' subsequent deportation was the proximate result of the discriminatorily motivated action by Respondent and constitutes a constructive discharge violative of Section 8(a)(3)

and (1) of the Act.[5] This finding is buttressed by the testimony of Edward Malin, a criminal investigator employed by the U.S. Immigration Service who credibly testified that the Immigration Service visited the Sure-Tan facilities on February 18, 1977, as a direct result of the letter received by the Immigration Service and identified General Counsel's Exhibit 18 as the "report that precipitated the visit to the Sure-Tan Company on the date of [in] question." Accordingly, I find that, but for Respondent's letter to Immigration, the discriminatees would have continued to work indefinitely for Respondent.

Additional 8(a)(1), (3), and (4) Allegations

Employee Albert Strong credibly testified that on or about January 31, 1977, he went to the Board Office and made a

[5] See *Amay's Bakery & Noodle Co., Inc.*, 227 NLRB 214 (1976). While I recognize that, in *Amay's*, the employer terminated the employees whereas, in the present case, the removal and deportation of employees was done by the Immigration Service which resulted in their *de facto* termination, the distiction does not affect my finding that Respondent's actions here resulted in the employees' constructive discharge, in violation of Sec. 8(a)(3) and (1) of the Act. In view of Respondent's knowledge that none of its employees had "papers" or work permits, its request to Immigration Service to investigate named employees would inevitably result in their deportation. Inasmuch as the request was motivated by the employees' selection and support of the Union, and Respondent is responsible for the foreseeable result of its action, their deportation is held to be a constructive discharge violative of Sec. 8(a)(3) and (1) of the Act. It should be emphasized, however, that the finding herein *does not* foreclose an employer from making a similar request where its request is not motivated by their employees' union activities or protected concerted activities. Cf. *Bloom/Art Textiles, Inc.*, 225 NLRB 766, 769 (1976).

No issue has been raised herein as to the applicability of a state statute governing the employment of illegal aliens. Cf. *Amay's Bakery, supra* at 217.

complaint about his being laid off. Shortly, thereafter, on or about February 4, 1977, John Surak approached him and berated him because he "filed a complaint about the layoff when you asked to be laid off." Surak then called him a "dirty son of a bitch." Sometime later John's brother, Steve Surak, called him a dirty son of a bitch stating, "You are trying to get money like you did before."[6] Strong also testified as to two incidents occurring on February 9 and 11, which are also alleged to be harassment. The February 9 incident concerned a minor dispute about the leather splitting machine where Strong attempted to show John Surak that the machine was malfunctioning and John took the material away from Strong stating, "If you ain't gonna do it, I'll get somebody else to do it." As to the February 11 incident, John Surak allegedly called him "a lazy punk" for failing to bring up a certain number of bags of chemicals. Later, as Strong was leaving work on February 11, he received a letter of reprimand (G.C. Exh. 27). Strong, an employee of some 11 years, further credibly testified that, prior to the union election on December 10, 1976, he had never received a letter of reprimand.

I find that Strong, a reinstated discriminatee from a previous case involving this employer, was upbraided on February 4, for filing a "complaint" with the Board about his layoff. While I find that the incidents that occurred on February 9 and 11 were rather trivial altercations which occur on a worksite and do not of themselves establish that Strong was being harassed because of his union sympathies, I do conclude that the letter of reprimand was an overreaction to relatively minor work disputes and was motivated by Strong's attempted utilization of Board processes and his support of the Union. I conclude and find, therefore, that the verbal harassment of February 4 and the written reprimand of February 11

[6] Referring to an earlier case involving Respondent's predecessor, *S. S. Surak and J. V. Surak d/b/a National Rawhide Manufacturing Co.*, 202 NLRB 893 (1973).

were motivated by Strong's attempted use of Board processes and his longstanding support for a union and such incidents are violative of Section 8(a)(1), (3), and (4) of the Act.[7]

CONCLUSIONS OF LAW (CASES 13-CA-16117 AND 13-CA-16229)

1. By requesting the Immigration and Naturalization Service to investigate the legal status of their Mexican national employees because of their support for the Union, with full knowledge that such employees had no papers or work permits, the Respondent caused the deportation of employees Francisco Robles, Sacramento Serrano, Juan P. Flores, Ernesto Arreguin, and Aguimino Ruiz, thereby constructively discharging them in violation of Section 8(a)(3) and (1) of the Act.

2. By questioning employees shortly after the representation election of December 10, 1976, in which the Union was selected as bargaining representative, if they had "papers" or "green cards" and mentioning immigration, Respondent engaged in a thinly veiled threat to notify the Immigration Service because they had supported the Union, and such conduct is violative of Section 8(a)(1) of the Act.

3. By interrogating employees in October and December 1976 about their union sentiments and the union sentiments and activities of other employees, Respondent, through its agent and supervisor, John Surak, violated Section 8(a)(1) of the Act.

4. By threatening employees in October 1976 with less work if they supported the Union and by threatening to go out of business on or about December 10 1976, because the Union won the election, the Respondent, through its agents and

[7] *Disposal Service, Inc.*, 226 NLRB 1310 (1976); *Lenox Hill Hospital*, 225 NLRB 1237 (1976).

supervisor, John Surak, engaged in conduct violative of Section 8(a)(1) of the Act.

5. By promising employees more work in October 1976 if they did not support the Union, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

6. By verbally harassing employee Albert Strong, on or about February 4, 1977, and by issuing a written reprimand to Albert Strong on or about February 11, 1977, because of his attempted use of Board processes and because of his longstanding support for a union, Respondent has engaged in conduct violative of Section 8(a)(1), (3), and (4) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Because the discriminatees were promptly deported to Mexico on or about Friday, February 18, 1977, because they were admittedly illegal aliens, the conventional remedy of backpay and reinstatement appears inadequate since being physically unavilable for employment nullifies any backpay liability and their inability to return to the United States renders reinstatement at best an unlikely prospect.

Counsel for the General Counsel stated at the hearing that the question of remedy was under advisement and, in their subsequent brief, merely requested the traditional remedy of backpay and reinstatement without any explanation as to how and under what theory backpay or reinstatement can be ordered in these circumstances.

Counsel for the Charging Party argues that, if the Respondent is not to benefit from its illegal conduct, the Respondent must be required to make a good-faith effort through U.S. Government channels to secure the aliens' return to the United

States and that Respondent's backpay obligation must continue to run until such discriminatees return to the United States and are offered proper reinstatement, or the proper Government agent rules that the employees cannot return to the United States, or the employee elects not to return to the United States. The Charging Party's requested remedy is unrealistic in that it requires the Employer to work for correction of the illegal status of aliens when he was not responsible for such status or for their being in the country. The request for backpay indefinitely is excessive and perhaps punitive in view of their unavailability for work. Lastly, there already has been a valid determination that these employees were illegal aliens.

I start with the basic premise that illegal aliens are employees within the meaning of the National Labor Relations Act and are entitled to the protection of the Act, including such conventional remedies as reinstatement and backpay.[8] Upon careful consideration and for the reasons noted hereafter, I recommend that a reinstatement order by expanded to a 6-month period. In view of my interpretation of prior Board precedent, my recommended Order will not grant backpay but will suggest that the Board consider awarding limited backpay in order to best effectuate the purposes of the Act.

I have considered whether to recommend that Respondent's hiring processes be monitored to prevent similar violations but, absent evidence that this Respondent is a repeat offender as to this type of violation, such extraordinary remedy seems unwarranted at this time. In any event, if the Respondent ultimately violates a court enforced Board Order, contempt action may be initiated.

With respect to reinstatement, I recommend that an additional 6-month period be granted from the date of this Decision (or the Decision of the Board if appealed) to afford these aliens ample opportunity to return legally and accept reinstatement if

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[8] *Amay's Bakery & Noodle Co., Inc., supra*

they desire. I note that Respondent's letter offer of reinstatement dated March 29, 1977, gave employees until May 1, 1977, to accept reemployment. Even assuming delivery of such letters in Mexico by April 10, 1977, this would afford employees 20 days or less to initiate procedures to re-enter the United States on work permits or other valid basis. Lastly, and perhaps more importantly, since the mail was not sent registered or certified mail and without return receipts, there is no evidence that the discriminatees ever received the offers of reinstatement. Accordingly, I recommend that further offers of reinstatement be made and that they be kept open for a 6-month period, and that, to the extent possible, receipt of such offers be verified. While I am cognizant that, even with this modification, reinstatement is still a dim prospect, a more reasonable time basis is necessary to make the reinstatement offer a more realistic and viable remedy.

With respect to a possible backpay recommendation, I am bound by past Board precedent which tolls backpay where an employee is not available because of illness,[9] because he has moved from the area, is no longer in the labor market,[10] is incarcerated,[11] or is in the Armed Forces.[12] I have been unable to find any precedent that would warrant the award of backpay in this case. Nonetheless, because the discriminatees were deported as a proximate result of Respondent's letter to the Immigration Service, failure to award any backpay results in the Respondent benefiting from its own unfair labor practice.

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[9] *Park Edge Sheridan Meats, Inc.*, 139 NLRB 748, 750 (1962).

[10] See *Rice Lake Creamery Company*, 151 NLRB 1113, 1115, fn. 10 (1965), dissenting viewpoint affd. 365 F.2d 888, 891 (1966).

[11] *Gifford-Hill & Co., Inc.* 188 NLRB 337, 338 (1971); *MSW Construction, Inc. d/b/a Hale & Sons Construction*, 219 NLRB 1073, 1079 (1975).

[12] *John David Brock, d/b/a J. D. Brock et al.*, 42 NLRB 457, 468-469 (1942).

Accordingly, the Board is invited to consider awarding backpay for at least a minimum period of 30 days (or 4 weeks) or alternatively, backpay ending 12 days after the letter of reinstatement was mailed, namely, April 10, 1977, as an exception to its normal rule for the following reasons: (1) Respondent's conduct, a violation of our Act *in this context,* caused the employees' unavailability; (2) while an employer may have the duty or even an obligation to request an investigation of his employees' alien status in ordinary circumstances, the Respondent did so here *only* when the Union successfully got the support of the employees; (3) without an award of some backpay, the violations herein will largely go unremedied and the Employer may be encouraged to adopt an apparently foolproof system of defeating union organizational attempts. Consequently, some backpay award can act as a deterrent to similar future violations; (4) a limited award of backpay will remedy the violations of our Act while given proper recognition and accommodation to the Federal statute on aliens.[13] In effect, therefore, a limited backpay award will act to remedy in part the violations of our Act while giving recognition to the fact that such employees were illegally in the country and in light of their unavailability should not be entitled to an indefinite backpay award. Thus, the Board is invited for any or all of the above reasons to consider making some backpay award. Constrained as I am by Board precedent, the Order herein will provide no backpay.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[13] 8 U.S.C. Sec. 1101, *et seq.* (NA).

ORDER[14]

The Respondent, Sure-Tan, Inc., and Surak Leather Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, support for, or activities on behalf of Chicago Leather Workers Union, Local 43L, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, by: threatening to notify the Immigration Service because of employees' support for the Union; notifying the Immigration Service and requesting a check on their status because of their support for the Union and thereby resulting in their deportation from the country and their constructive discharge; interrogating employees about their union sentiments and sympathies and that of their fellow employees; threatening employees with less work if they supported the Union; promising employees more work if they did not support the Union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Francisco Robles, Ernesto Arreguin, Sacramento Serrano, Arguimino Ruiz, and Juan P. Flores reinstatement to their former jobs and, if those jobs are not available, comparable jobs. If such offer is made in writing, evidence of receipt of such offer

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[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

should be submitted in view of the fact that the discriminatees' last known addresses are in Mexico. Offers of reinstatement shall be held open for a period of not less than 6 months from the date of issuance of this Decision, or, if such decision is appealed to the Board, such offer shall be held open for 6 months from the date of issuance of the Board's Decision or court enforcement of that Decision, whichever is applicable. Since the above employees were not available for employment there is no backpay award absent a Board modification of this recommended Order.

(b) Post at its premises in Chicago, Illinois, copies of attached notice marked "Appendix."[15] Copies of said notice shall be in English and Spanish, on forms provided by the Regional Director for Region 13 and, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. In addition, Respondent will mail a copy of such notice to the discriminatees at their last known address.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

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[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."